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No. _____

In The

Supreme Court of the United States

October Term, 1996

FRANK McCOY,

Petitioner,

v.

SAN FRANCISCO, CITY & COUNTY, a Municipal Corp.; OFFICE OF CITIZEN COMPLAINTS, a Public Entity Department of the City and County of San Francisco; FRANK JORDAN, Individually and in his official capacity as Chief of Police of the San Francisco Police Dept.; MICHAEL LANGER, Individually and in his official capacity as Chief Investigator of the Office of Citizen Complaints; DANIEL J. SILVA, Individually and in his official capacity as Chief Investigator of the Office of Citizen Complaints; LAWRENCE SHOCKEY, Individually and in his official capacity as Special Investigator of the Office of Citizen Complaints; MICHAEL GASH, Individually and in his official capacity as Attorney for the San Francisco Police Dept.; MIRIAM MORLEY, Individually and in her official capacity as Deputy City Attorney; ARTHUR HARTINGER, Individually and in his official capacity as Deputy City Attorney,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In the case of a fully vested, non-probationary public employee who alleges, and on summary judgment adduces ample evidence to permit a jury to conclude, that his employer engaged in a continuing course of arbitrary, capricious and retaliatory conduct in the investigation and prosecution of serial disciplinary charges,

1. When the deprivation of the employee's constitutional rights is deliberately effected by means of an established procedure entrusted to those who effected the deprivation, is defendants' civil rights liability either precluded or diminished because the employee ultimately succeeded in defending himself?

PARTIES TO THE PROCEEDINGS

The names of all parties to the proceedings in the United States Court of Appeals for the Ninth Circuit follow:

Frank C. McCoy, An Individual
The City & County of San Francisco, A Municipal Corporation
The San Francisco Police Commission, A Public Entity Department of the City & County of San Francisco
The Office of Citizen Complaints, A Public Entity Department of the City & County of San Francisco
Frank Jordan, Individually and In His Official Capacity as Chief of Police of the San Francisco Police Department
Michael A. Langer, Individually and In His Official Capacity as Director of the Office of Citizen Complaints
Daniel Silva, Individually and In His Official Capacity as Chief Investigator of the Office of Citizen Complaints
Lawrence Shockey, Individually and In His Official Capacity as Special Investigator of the Office of Citizen Complaints
Michael Gash, Individually and In His Official Capacity as Attorney for the San Francisco Police Department
Miriam Morley, Individually and In Her Official Capacity as Deputy City Attorney for the City & County of San Francisco
Arthur Hartinger, Individually and In His Official Capacity as Deputy City Attorney for the City & County of San Francisco

PARTIES TO THE FROCEEDINGS – Continued

There is no parent or nonwholly owned subsidiary company to be listed pursuant to Supreme Court Rules 14(b) and 29.6.

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Comes now Frank C. McCoy, who respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this matter, as follows:

Citations to Official and Unofficial Reports

Defendants' Summary Judgment Affirmed

The Ninth Circuit Court of Appeals' memorandum opinion affirming summary judgment against petitioner (Appendix A, *infra*) is unreported, as is the Court's post-oral-argument briefing order. (Appendix B, *infra*)

Defendants Granted Summary Judgment

The United States District Court for the Northern District of California's judgment (Appendix C, *infra*) and order (Appendix D, *infra*) granting defendants summary judgment are unreported.

Petitioner Granted Partial Summary Judgment

The United States District Court for the Northern District of California's order granting petitioner partial summary judgment (Appendix E, *infra*) is unreported.

Defendants' Res Judicata Motion to Dismiss Denied

The United States District Court for the Northern District of California's order denying defendants' motion to dismiss on res judicata grounds (Appendix F, *infra*) is unreported.

The Statute of Limitations Dismissal Reversed

The Ninth Circuit Court of Appeals' decision (Skopil, Circuit Judge) (Appendix G, *infra*) reversing the United States District Court for the Northern District of California's order dismissing petitioner's second amended complaint is reported at 14 F.3d 28 (9th Cir. 1994).

The United States District Court for the Northern District of California's orders dismissing petitioner's second amended

complaint (Appendix H, *infra*) and first amended complaint (Appendix I, *infra*) on statute of limitations grounds are unreported.

Petitioner's Discipline Reversed on Due Process Grounds

The First District Court of Appeal of the State of California's decision (Newsom, J.) (Appendix J, *infra*) reversing the Superior Court of the State of California in and for the County of San Francisco's order denying petitioner's petition for writ of administrative mandamus on due process grounds is unreported, as are the two San Francisco Police Commission's administrative decisions sustaining (Appendix K, *infra*) and dismissing (Appendix L, *infra*) disciplinary charges against petitioner.

Statement of United States Supreme Court Jurisdiction

The Ninth Circuit Court of Appeals' memorandum opinion affirming summary judgment against petitioner was entered January 21, 1997, and 28 U.S.C. Section 1254(1) vests this Court with jurisdiction to review it on certiorari.

Constitutional, Statutory, Charter and Regulatory Provisions

The United States Constitution

The First Amendment to the United States Constitution provides in full:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section 1 of the Fourteenth Amendment to the United States Constitution provides in full:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State

wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Pursuant to Supreme Court Rule 14(f) and (i)(v), the verbatim text of pertinent portions of California Government Code Sections 3301, 3303(g), 3304(a), 3304(b) and 3309.5(a), of California Code of Civil Procedure Sections 1094.5(a), (b) and (f); of California Rules of Professional Conduct 5-200(A) and (B), 5-220 and 5-300(B); of San Francisco Charter Sections 3.500(a), 3.530, 3.532, 3.530-2 and 8.343; and of San Francisco Police Department General Order D-1 Rule A-9, are set forth as Appendix M.

STATEMENT OF THE CASE

This case is a 42 U.S.C. Sections 1983, 1986 and 1988 civil rights complaint over which the United States District Court for the Northern District of California had original jurisdiction pursuant to 28 U.S.C. Section 1331.

The George Smoot Homicide and Its Aftermath

The Gay Community Criticizes The Police Department

Veteran San Francisco Homicide Inspector Frank McCoy was one of several officers assigned to investigate the stabbing death of George Smoot the night of November 28, 1987; a juvenile confessed that night and would later be convicted of manslaughter.

Because the juvenile was charged only with manslaughter rather than murder, the San Francisco gay community was highly critical of the investigation from its inception, claiming the officers conducted an incomplete and biased investigation because the victim was homosexual. The Bay Area

media coverage to that effect – including articles written by Messrs Bill Paul and Jay Newquist – was pervasive.[1]

Chief Frank Jordan's Order for Homicide File Information

Concerned about the criticism and the "very high profile" nature of the case,[2] then-Chief of Police Frank Jordan – who would later become Mayor[3] – met several times with gay community leaders and members including Bill Paul,[4] and in response ordered written answers be prepared to their questions[5] – some of which required providing information from the still-active homicide file.[6]

Concerned the disclosure was improper, on his Lieutenant's instructions and the District Attorney's advice, Inspector McCoy answered the questions as ordered; made no copies; and attached a copy of the California statute making it illegal to provide the public information concerning a juvenile criminal investigation.[7]

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[1] *See, e.g., Excerpt of Record* (hereinafter, "ER"), 162 Exhibit B (McCarthy Deposition), at Exhibit 3 (Circular); ER 100 (Morley Declaration), at Exhibit H (Articles); ER 162, Exhibit C, at 102:24-107:20 (Jordan Deposition)

[2] ER 162, Exhibit C, at 17:8-22:18, at 28:1-30:1, at 61:26-62:20, at 102:24-107:20; 134:23-136:21 (Jordan deposition), and Exhibit 17 (Memorandum)

[3] ER 99, at ¶¶ 1 and 2 (Jordan Declaration)

[4] *Id.*, at ¶¶ 8 and 9 (Jordan Declaration); ER 162, Exhibit B (McCarthy Deposition), at Exhibit 3 (Circular); ER 166, at Fact and Response 49 (Undisputed Facts)

[5] ER 162, Exhibit A, at 22:25-24:19 (McCoy Deposition); ER 162, Exhibit B (McCarthy Deposition), at Exhibit 1, page 3 (Chronology); ER 162, Exhibit C, at 33:5-48:8 (Jordan Deposition)

[6] ER 162, Exhibit C, at 24:20-27:10, at 41:10-48:2-8 (Jordan Deposition)

[7] ER 162, Exhibit A, at 22:17-25:12 (McCoy Deposition)

The Stonewall Gay Democratic Club Citizen's Complaint

On April 7, 1988 the Police Department's own internal affairs investigation concluded Inspector McCoy had neither committed any wrongdoing nor exhibited "homophobi[a]" in his investigation of the Smoot homicide.[8]

Designating Bill Paul their point of contact, on April 28, 1988 the Stonewall Gay Democratic Club and the Alice B. Toklas Lesbian and Gay Democratic Club nevertheless filed a complaint against the officers, including Inspector McCoy, with the Office of Citizen Complaints[9] – the "O.C.C."

The O.C.C. in turn assigned the investigation of the complaint to Lawrence Shockey.[10] As then-Mayor Jordan later characterized it, Shockey's investigating experience "was less than desirable."[11] Indeed in addition to the poor performance evaluations in his personnel file,[12] Shockey had once advocated that the O.C.C. destroy its working files so they would not have to be produced in federal civil rights actions.[13]

During the course of his investigation of the Stonewall Gay Democratic Club citizen's complaint, with his superior Daniel Silva's approval, Shockey would be promoted to a unique position as "Special Investigator" – whose function it was to "handle special assignments": "Priority matters."

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[8] ER 162, Exhibit B (McCarthy Deposition), at Exhibit 2 (Memorandum); ER 163, Exhibit G (Shockey Deposition), Exhibit 4 (Memorandum); ER 166, at Fact and Response 47 (Undisputed Facts)

[9] ER 162, Exhibit E, at 47:10-48:9 (Silva Deposition), and at Exhibit 1.

[10] ER 91, at ¶ 3 (Shockey Declaration); ER 163, Exhibit N, at 157:12-16 (Commission Transcript)

[11] ER 162, Exhibit C, at 124:22-26 (Jordan Deposition)

[12] ER 159, Exhibit AA ("Performance Appraisal Report"); ER 162, Exhibit F, at 205:23-210:24 (Langer Deposition)

[13] ER 163, Exhibit L, at page 3 (Memorandum); ER 162, Exhibit G, at 149:13-152:12 (Shockey Deposition); ER 162, Exhibit E, at 169:4-173:9 (Silva Deposition)

"Cases that were high-profile cases, cases that the Commission itself had instructed the OCC to look at, those types of things."[14]

Shockey could not recall whether in fact he handled any case other than the Stonewall Gay Democratic Club citizens' complaint at the time.[15]

The Bill Paul Citizen's Complaint

The convicted juvenile in the Smoot homicide filed a new trial motion, and in order to investigate it, on May 17, 1988 Inspector McCoy telephoned Bill Paul and Jay Newquist to interview them concerning various witness' statements in the media reports which were part of the still-active homicide file.[16]

Because he set up the tape-recording device incorrectly, only his own part of the Bill Paul interview was recorded. Paul stated, however, that he had no complaint against Inspector McCoy's own conduct in the Smoot homicide investigation.[17]

Inspector McCoy noted each conversation in his homicide file chronological investigation report,[18] and each tape was made part of the homicide file given to the District Attorney for use in the pending new trial motion. Inspector McCoy also informed his supervisor Lieutenant McCarthy, who did not criticize Inspector McCoy for having made the

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[14] ER 162, Exhibit E, at 212:20-214:18 (Silva Deposition); ER 162, Exhibit F, at 61:3-6, at 63:17-64:4 (Langer Deposition)

[15] ER 163, Exhibit G, at 86:24-26 (Shockey Deposition)

[16] ER 163, Exhibit N, at 104:6-7, at 112:9-113:5 (Commission Transcript); ER 163, Exhibit O, at 131:21-134:24, 149:23-150:7 (Commission Transcript); ER 162, Exhibit A, at 119:24-120:13 (McCoy Deposition)

[17] ER 163, Exhibit N, at 84:2-85:18, at 104:12-21 (Commission Transcript); ER 163, Exhibit O, at 108:12-18, at 111:16-112:25 (Commission Transcript)

[18] ER 161, Exhibit B (McCarthy Deposition), at Exhibit 1 ("Chronological Report of Investgation")

calls. It was indeed undisputed that at the time, there was no rule, regulation or order prohibiting contacting citizen complainants or witnesses.[19]

Lieutenant McCarthy told Inspector McCoy to contact the O.C.C. Chief Investigator Daniel Silva and let him listen to the tape when the three met later the same day;[20] when Inspector McCoy did so,[21] however, Silva refused, stating " ' . . . I don't want to know about that tape and I don't want to hear about it.' "[22]

When deposed in this case Silva admitted Inspector McCoy in fact did offer to let him listen to the tape, and that on O.C.C. Director Michael Langer's instruction he personally informed Bill Paul the conversation had been tape-recorded.[23]

Bill Paul and Jay Newquist made a citizen's complaint against Inspector McCoy with the O.C.C. the following day, and it was assigned to O.C.C. investigator Barbara Attard.

The Police Commission Adopts The "McCoy Rule"

On June 28, 1988 the Police Commission adopted Resolution 1159-88 – commonly known as the "McCoy Rule" – which prescribed officers' conduct when their duties required them to contact a citizen complainant or witness.[24]

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[19] ER 166, at Facts and Responses 54 and 58 (Undisputed Facts); ER 162, Exhibit F, at 91:19-23 (Langer Deposition)

[20] ER 162, Exhibit B, at 50:22-51:10 (McCarthy Deposition)

[21] *Id.* at 52:3-12; ER 166, at Fact and Response 53 (Undisputed Facts)

[22] ER 162, Exhibit A, at 118:21-119:15 (McCoy Deposition); ER 162, Exhibit B, at 52:6-19 (McCarthy Deposition)

[23] ER 162, Exhibit E, at 105:8-23, at 153:10-158:15, at 177:24-180:18 (Silva Deposition)

[24] Appendix J, at J-5 ¶ 2 (Court of Appeal Opinion); ER 166, at Fact and Response 58 (Undisputed Facts); ER 162, Exhibit D, at 101:16-104:4 (Attard Deposition)

Chief Jordan Charges Petitioner With Unofficer-like Conduct Based On The Stonewall Gay Democratic Club Citizen's Complaint

Although Office of Citizen Complaints investigator Shockey had initially concluded from his investigation of the Stonewall Gay Democratic Club citizen's complaint that there was no evidence Inspector McCoy had engaged in "overtly homophobic conduct," after speaking with his superiors Michael Langer and Daniel Silva, he found there was evidence of "internal" homophobic bias in Inspector McCoy's homicide investigation.[25]

On July 1, 1988 the O.C.C. issued its report to Chief Jordan, recommending that he sustain three of the four complaints the Stonewall Gay Democratic Club and the Alice B. Toklas Lesbian and Gay Democratic Club had made, including the finding that "the inadequate investigation . . . 'may have been due to Mr. Smoot's status as a gay man.' "[26]

The Police Department's own internal affairs division reviewed the O.C.C. report, and found the O.C.C. conclusions insupportable.[27]

On September 7, 1988 Chief Jordan nevertheless charged Inspector McCoy before the Police Commission, with neglect of duty and unofficer-like conduct under General Order D-1 Rule A-9, on three specifications including failure to collect evidence "after being informed that the homicide victim was homosexual and may have made a sexual advance toward the juvenile suspect. . . . "[28]

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[25] Appendix O, O-1 to O-6 (Shockey Deposition); ER 163, Exhibit G, at 68:21-73:22 (Shockey Deposition)

[26] ER 91, at ¶ 9 (Shockey Declaration)

[27] ER 162, Exhibit B, at 58:20-59:10 (McCarthy Depositon); ER 162, Exhibit C, at 126:15-127:6 (Jordan Deposition)

[28] ER 162, Exhibit B (McCarthy Deposition), at Exhibit 6, at 5:10-22 (Specification of Charges); ER 99 at ¶ 7 (Jordan Declaration)

The O.C.C. Sustains The Bill Paul Citizen's Complaint

As part of her investigation of the Bill Paul citizen's complaint, Barbara Attard interviewed her supervisor Daniel Silva, who told her Inspector McCoy had never offered him the opportunity to listen to the Bill Paul tape.[29] She also interviewed Inspector McCoy's supervisor Lieutenant McCarthy, who told her Silva's statement was incorrect; that Inspector McCoy had not been insubordinate; and that Inspector McCoy had violated no rule in telephoning Paul or Newquist.[30]

On October 11, 1988 the O.C.C. report sustained the Bill Paul and Jay Newquist complaint, on grounds Inspector McCoy had improperly tape-recorded the interviews; had refused, according to Silva's written witness statement, to provide Silva the tape-recording; and had placed the calls intending to interfere with the O.C.C. investigation of the Stonewall Gay Democratic Club citizen's complaint – attaching a copy of Resolution 1159-88, which Attard knew did not exist at the time the calls were made.[31]

Silva testified he told Chief Jordan that Inspector McCoy had in fact given him the opportunity to listen to the Bill Paul tape.[32]

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[29] ER 162, Exhibit D, at 97:8-15 (Attard Deposition)

[30] ER 166, at Fact and Response 56 (Undisputed Facts); ER 162, Exhibit D, at 115:13-116:19 (Attard Deposition); ER 162, Exhibit B, at 54:11-55:21, at 68:11-69:6 (McCarthy Deposition)

[31] ER 92 (Attard Declaration), at Exhibit A (Memorandum), at page 14 [III.C.¶ 1], at page 16 [V.F.]; ER 162, Exhibit D, at 101:16-107:6 (Attard Deposition); ER 162, Exhibit B (McCarthy Deposition), at Exhibit 7 (Memorandum); ER 166, at Fact and Response 58 (Undisputed Facts)

[32] ER 162, Exhibit E, at 181:21-182:8 (Silva Deposition)

The Federal District Court Orders The Police Commission To Continue The Hearings On The Stonewall Gay Democratic Club Citizen's Complaint

In December 1988 the officers charged in the Stonewall Gay Democratic Club citizen's complaint sought and obtained a preliminary injunction from the United States District Court for the Northern District of California, ordering the Police Commission to continue its January 18, 1989 hearing date.[33] On court order the Commission did so, resetting it for March 15, 1989.[34]

Chief Jordan Charges Petitioner With Unofficer-like Conduct Based On The Bill Paul Citizen's Complaint

On January 17, 1989 Chief Jordan charged Inspector McCoy with a ten-day suspension based on the Bill Paul and Jay Newquist citizen's complaint. Inspector McCoy requested a hearing before the Chief, which finally concluded June 1, 1989, when Chief Jordan himself took it under submission for decision.[35]

The Defense Discovery Efforts In The Police Commission Proceedings On The Stonewall Gay Democratic Club Complaint

The O.C.C. Practice

The O.C.C. practice was to support its reports with only those portions of its investigation file that were "relevant" or "important" to its disciplinary recommendations: "[T]he evidence we use to come to our findings."[36]

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[33] ER 95, at ¶¶ 5-9 (Hartinger Declaration)

[34] ER 95 (Hartinger Declaration), at Exhibit A (Police Commission Order)

[35] Appendix K, at K-3 ¶ 1 (Police Commission Order); ER 99, at ¶ 7 (Jordan Declaration)

[36] ER 162, Exhibit D, at 118:22-125:13 (Attard Deposition); ER 162, Exhibit E, at 80:23-81:22 (Silva Deposition)

> "When a case is completed and has at least one sustained allegation in it, the file is made up that includes the report and all of the evidence that was used to come to the conclusion. [¶] There's always other documents that aren't part of – aren't considered as evidence, and so those other documents aren't considered part of the official report."[37]

The Office retained its closed investigation files in a locked room.[38] The investigators kept their own interview notes, either "just in a file at their desk in case they were asked questions later," or "shred[ded]" or "destroy[ed]" as the investigator or his supervisor might determine.[39]

The Charged Officers' Discovery Request

In order to prepare their defense before the Police Commission on the Stonewall Gay Democratic Club citizen's complaint, on January 25, 1989 the charged officers formally requested San Francisco Police Department counsel Michael Gash to produce eight categories of documents under cited statutory and caselaw authority.[40]

Representing both the Police Department and the O.C.C., Gash responded February 23, 1989 that the officers had already been provided "extensive discovery," including "the OCC's report and its supporting documents. . . . "[41]

The charged officers' counsel objected in detail, pointing out in part: "[W]e have first-hand knowledge that there are documents that directly pertain to the OCC investigation, two

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[37] ER 162, Exhibit D, at 119:19-26 (Attard Deposition)

[38] ER 162, Exhibit E, at 82:17-21 (Silva Deposition)

[39] ER 162, Exhibit D, at 119:14-121:18 (Attard Deposition); ER 162, Exhibit E, at 80:23-81:22 (Silva Deposition)

[40] Appendix P, *infra;* ER 159, Exhibit EE (Morley Correspondence), at Exhibit A (Seliger Correspondence)

[41] ER 100, at ¶ 6 (Morley Declaration); ER 96, Exhibit C (Gash Correspondence) at ¶ 6 (Gash Declaration)

subsequent investigations initiated internally by the Department as well as a series of meetings held as to whether or not there was good cause to even file charges against any of the . . . inspectors."[42]

The Charged Officers' Police Commission Subpoena

On March 10, 1989 the charged officers served O.C.C. Director Langer with a Police Commission subpoena for part of the documents requested January 25, 1989.[43]

At the March 15, 1989 Police Commission hearing, representing Chief Jordan and the Police Department Gash informed the Police Commission "we will not comply with the subpoena[,]" because the officers had already been provided "the material that I have received from the OCC which is the sole basis for the charges."[44]

Representing the City and County of San Francisco but "responding on behalf of the OCC," Deputy City Attorney Morley informed the Commission "[t]he OCC respectfully refuses to produce documents that were requested pursuant to the Police Commission subpoena served March 10th."[45] Although she had not reviewed them, Morley also stated to the Commission the O.C.C. had no exculpatory evidence in its files.[46]

Although aware the Police Commission had the Charter authority to order the O.C.C. to produce its files, representing the City and County of San Francisco, Morley also advised

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[42] ER 96 (Gash Declaration), Exhibit D at Exhibit C (Seliger Correspondence)

[43] ER 100, at ¶ 5 (Morley Declaration)

[44] ER 163, Exhibit P, at 7:13-9:2 (Commission Transcript)

[45] Appendix Q, *infra*, at 18:3-21:19 (Morley Deposition); ER 163, Exhibit J, at 18:3-21:19 (Morley Deposition); ER 163, at Exhibit P, at 9:8-14 (Commission Transcript)

[46] Appendix Q, *infra*, at 26:14-26 (Morley Deposition); ER 163, Exhibit J, at 26:14-26 (Morley Deposition)

the Police Commission it had no power to enforce its own subpoena.[47]

Morley could not recall whether she thought about conflicts of interest in her role that night, but when later deposed expressed her opinion there were no adverse interests as amongst the charged officers, the O.C.C., the Police Department and the Police Commission.[48]

The Charged Officers' Federal Application

On March 29, 1989 the charged officers returned to federal court to seek a temporary restraining order against the Police Commission proceedings going forward.[49] Gash, Hartinger and Langer declarations advised the court no additional documents existed,[50] and Morley knowingly falsely attested the O.C.C. would produce its unproduced files for the Police Commission's *in camera* review at its April 5, 1989 meeting.[51] The District Court denied the temporary restraining order April 4, 1989.[52]

The Charged Officers' State Court Petition

At the April 5, 1989 Police Commission meeting, Morley stated there were only five O.C.C. documents responsive to

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[47] Appendix Q, *infra*, at 13:20-25; at 39:6-42:18 (Morley Deposition); ER 163, Exhibit J, at 13:20-25; at 39:6-42:18 (Morley Deposition); ER 163, Exhibit R, at ¶¶ 2 and 3 (Morley Declaration); ER 100, at ¶¶ 10, 11 (Morley Declaration)

[48] Appendix Q, *infra*, at 21:20-26:13 (Morley Deposition); ER 163, Exhibit J, at 21:20-26:13 (Morley Deposition)

[49] ER 95, at ¶¶ 11-16 (Hartinger Declaration)

[50] ER 163, Exhibit Q, ¶ 6 (Gash Declaration); ER 163, Exhibit S, at 2:2-7 and 8:2-10 (Hartinger Brief); ER 163, Exhibit T, ¶ 12 (Langer Declaration)

[51] ER 163, Exhibit R, ¶¶ 3 and 4 (Morley Declaration); Appendix Q, *infra*, at 42:14-46:19 (Morley Deposition); ER 163, Exhibit J, at 42:14-46:19 (Morley Deposition)

[52] ER 95, at ¶ 16 (Hartinger Declaration)

the officers' discovery request and subpoena, and that the Office "has delivered those documents to the secretary of the Commission" for its *in camera* review.[53] At the time, she still had not reviewed the Office of Citizen Complaint files, and was relying on Director Langer's information.[54]

On April 25, 1989 the charged officers petitioned the San Francisco County Superior Court for either injunctive or writ relief enforcing the Police Commission subpoena, and asserting documents – including the homicide file answers Inspector McCoy had prepared on Chief Jordan's order – were being withheld or destroyed.[55] Once again Gash, Langer and Morley submitted declarations in opposition.

On April 26, 1989 Morley informed the Police Commission on record that "I have discovered no documents that are relevant or material to this action and that would assist the officers in their defense."[56]

(It was undisputed that in fact "[n]one of the attorney defendants visited OCC's offices to look for documents responsive to McCoy's request for discovery.")[57]

On May 3, 1989 the charged officers advised Hartinger they still had not received the documents the Department had asked Inspector McCoy to prepare in connection with the Smoot investigation, and were concerned because Shockey routinely destroyed his investigative notes.[58]

On May 10, 1989 Deputy City Attorney Hartinger provided the charged officers what he described as "the majority

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[53] ER 159, at Exhibit GG, at 30:4-23 (Commission Transcript)

[54] Appendix Q, *infra*, at 45:18-48:23 (Morley Deposition); ER 163, Exhibit J, at 45:18-48:23

[55] ER 95, at ¶¶ 23-26 (Hartinger Declaration)

[56] ER 159, Exhibit HH, at 7:4-6 (Commission Transcript)

[57] ER 166, at Fact and Response 61 (Undisputed Facts)

[58] ER 163, Exhibit K (Hartinger Deposition), at Exhibit 4 (Seliger Correspondence)

of the OCC documents."[59] He submitted additional documents to the court for *in camera* review,[60] but only after the court informed him they should be produced did the City Attorney do so, on May 23, 1989.[61] They included memoranda and correspondence amongst Silva, Langer, Chief Jordan, Shockey and each other, the ACLU, Bill Paul and Police Commissioner Giraudo.[62] Hartinger assured the officers' counsel, "You now have all located documents responsive to your subpoenas and your January 25, 1989 letter."[63]

In fact Morley had knowingly provided Hartinger only the O.C.C. complaint work summary she had redacted; the O.C.C. considered the work summary confidential – as Morley had herself counseled them in that regard.[64]

The Police Commission Discovery Proceedings

The charged officers having demanded a complete copy of the O.C.C. complaint work summary, on May 31, 1989 Morley counseled Police Commissioner Giraudo at some length in correspondence captioned "*CONFIDENTIAL – ATTORNEY-CLIENT PRIVILEGE*," that the complaint work summary was "the investigator's working notes," which the O.C.C. considered confidential:

> "The City Attorney has argued in the past, and it is the position of the OCC, that disclosure of the Complaint Work Summary would impair the ability

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[59] ER 95 (Hartinger Declaration), at Exhibit B, ¶ 2 (Hartinger Correspondence)

[60] ER 95 (Hartinger Declaration), at Exhibit D (Hartinger Correspondence)

[61] ER 95, at ¶¶ 23-33 (Hartinger Declaration), at Exhibit E (Hartinger Correspondence)

[62] ER 95 (Hartinger Declaration), at Exhibit E, page 1 (Hartinger Correspondence)

[63] *Id.*, at page 2 ¶ 1 (Hartinger Correspondence)

[64] ER 163, Exhibit J, at 71:5-80:10 (Morley Deposition); ER 95, at ¶ 32 (Hartinger Declaration)

> of the OCC to conduct its investigations. . . . Disclosure of the Complaint Work Summary to people outside the OCC could detract from aggressive, probing and complete investigations by the OCC."[65]

Testifying before the Police Commission the following week, on cross-examination Shockey revealed there were additional investigator's notes he had prepared from a witness interview in the Stonewall Gay Democratic Club citizen's complaint, but that they had probably been destroyed in keeping with his own and O.C.C. practice.[66]

According to another "*PRIVILEGED AND CONFIDENTIAL ATTORNEY/CLIENT COMMUNICATION*" Morley sent to the Commission June 14, 1989, however, Shockey was "mistaken," and there were in fact an extensive number of "unproduced" O.C.C. documents – although in Morley's expressed opinion "[i]t is our view that the charged officers have never requested these documents."[67]

Shockey was never admonished for what the O.C.C. considred an "embarrass[ing]" and "serious" incident.[68]

Silva resigned from the O.C.C. after admitting at a press conference to having knowingly leaked confidential O.C.C. investigative files to the broadcast media prior to a Grand Jury inquiry into another high-profile O.C.C. police misconduct case.[69]

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[65] Appendix R, *infra*, at R-1 through R-3 (Morley Correspondence); ER 159, Exhibit DD, at ¶¶ 1 and 4 (Morley Correspondence); ER 163, Exhibit J, at 80:1-26 (Morley Deposition)

[66] ER 159, Exhibit EE, at ¶ 2 (Morley Correspondence)

[67] Appendix S, *infra*, at S-2 ¶ 2 and S-3 ¶ 3 (Morley Correspondence); ER 159, Exhibit EE, at ¶¶ 2 and 6; ER 91, at ¶¶ 12-18 (Shockey Declartion)

[68] ER 162, Exhibit F, at 180:21-183:10 (Langer Deposition); ER 162, Exhibit E, at 212:1-19 (Silva Deposition); ER 166, at Fact and Response 62 (Undisputed Facts)

[69] ER 162, Exhibit E, at 232:2-242:3 (Silva Deposition); ER 162, Exhibit F, at 100:8-114:18 (Langer Deposition)

When deposed in this matter, Langer was instructed not to answer questions concerning O.C.C. leaks to the media – including those concerning Inspector McCoy and the Smoot homicide investigation – because as a result of a settlement and confidentiality agreement between Silva and the City and County of San Francisco, at a meeting in City Hall Langer had " 'receive[d] some instruction what [he] could and couldn't talk about subsequent to Mr. Silva leaving.' "[70]

The Police Commission Grants The Charged Officers' Motion To Dismiss The Charges On The Stonewall Gay Democratic Club Citizen's Complaint

Not until January 22, 1990 – and only on the charged officers' own written motion – did the Police Commission finally dismiss the charges against Inspector McCoy on the Stonewall Gay Democratic Club citizen's complaint, Commissioner Craig observing at length that the hearing had become a political "charade" which had "laid bare the inadequacies of [the O.C.C.'s] own investigatory skills[,]" and recommending the Commission endorse then-Mayor Agnos' recommendation that in the future the O.C.C. "report directly on sustained charges to this Commission rather than through the Chief."[71]

Later the same evening after the Police Commission meeting, when Chief Jordan passed Inspector McCoy in a restaurant Jordan stated, " 'You're only halfway through this.' " Inspector McCoy asked him what he meant and Chief Jordan stated, " 'Well, you still have these other charges that you're going to have to face.' " When Inspector McCoy told him " 'You were wrong, as you know, in McCoy I and you're

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[70] ER 162, Exhibit F, at 106:8-108:2 (Langer Deposition)

[71] Appendix L, *infra* (Commission Resolution); ER 159, Exhibit BB (Commission Resolution)

wrong in McCoy II, also,' " Chief Jordan replied, " 'Well, you *should have taken McCoy I.*' "[72]

Chief Jordan Suspends Inspector McCoy On The Bill Paul Citizen's Complaint

Less than one month later – after having held onto the matter for over eight months – Chief Jordan ordered Inspector McCoy suspended for two days on the Bill Paul citizen's complaint, for violating General Order D-1 Rule A-9, and Inspector McCoy appealed the suspension to the Police Commission.[73]

On Appeal The Police Commission Sustains Chief Jordan's Suspension On The Bill Paul Citizen's Complaint

After the Police Commission announced it intended to sustain Chief Jordan's disciplinary suspension on the Bill Paul citizen's complaint,[74] counsel for the Police Department submitted (unsolicited) proposed findings of fact and conclusions of law *ex parte*.[75]

On September 13, 1990 the Commission issued its written decision granting Inspector McCoy's First Amendment motion to dismiss as to Newquist, and sustaining Chief Jordan's suspension on the Bill Paul citizen's complaint – exclusively on the basis of General Order D-1 Rule A-9.[76]

Chief Jordan was elected the Mayor of San Francisco the following year.[77]

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[72] Appendix T, *infra*, at 71:17-73:14 (McCoy Deposition) (Emphasis added); ER 162, Exhibit A, at 71:17-73:14 (McCoy Deposition)

[73] ER 166, at Fact and Response 59 (Undiputed Facts)

[74] Appendix K, *infra*, at K-4 ¶ 4

[75] ER 159, Exhibit CC ("Proposed Findings of Fact")

[76] Appendix K, *infra*, at K-3 to K-4

[77] ER 99, at ¶¶ 1 and 2 (Jordan Declaration)

The Civil Rights Action Filed

Inspector McCoy served his suspension, and on September 3, 1991 filed this civil rights action, alleging violations of his civil rights in the foregoing course of events.[78]

The State Court Writ of Mandate Filed

On October 21, 1991 he filed a petition for writ of administrative mandate in the San Francisco Superior Court and appealed the case to the First District Court of Appeal of the State of California when the Superior Court denied the writ.

The Amended Civil Rights Complaints

On November 20, 1991 he amended his civil rights action, and named the Police Commission an additional defendant; on April 10, 1992 the District Court dismissed the suit on statute of limitations grounds, with leave to amend.[79] The (operative) second amended complaint followed April 29, 1992,[80] which the District Court also dismissed on statute of limitations grounds June 26, 1992.[81]

The Administrative Discipline Reversed On Due Process Ground

On October 18, 1993 the First District Court of Appeal of the State of California reversed the lower court order denying Inspector McCoy's petition for administrative mandamus, on the ground that particularly in view of the later-passed Resolution 1159-88, General Order D-1 Rule A-9 was unconstitutionally vague as applied to the conduct on which the Bill Paul citizen's complaint charges were based.[82]

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[78] Appendix G, *infra*, at G-2 ¶ 2 (Ninth Circuit Published Opinion)

[79] Appendix I, *infra*

[80] Appendix N, *infra*

[81] Appendix H, *infra*

[82] Appendix J, *infra*, at J-5 ¶ 2 and at J-12 ¶ 2 and note 3

The Statute of Limitations Dismissal Reversed

In a published Opinion issued January 7, 1994 the Ninth Circuit Court of Appeals (Skopil, Circuit Judge) reversed the lower court's order dismissing the second amended complaint on statute of limitations grounds.[83]

The Mandamus Judgment In This Action

On June 16, 1994 the District Court denied defendants' motion to dismiss the second amended civil rights complaint on absolute immunity, qualified immunity and res judicata grounds, based on the First District Court of Appeal decision in the mandamus proceeding: "[A]n administrative mandamus judgment vacating illegal termination does not bar the employee from bringing a cause of action under section 1983."[84]

On November 18, 1994 the District Court in turn granted petitioner partial summary judgment on issue preclusion grounds, holding defendants acted "under color of law and under authority of their respective offices," and that they "are collaterally estopped from relitigating the issue of the constitutionality of the Police Department rule [General Order D-1 Rule A-9] as applied to McCoy."[85]

In response to defendants' claim the second amended complaint "contains no allegations regarding due process violations on *inadequate notice*[,]" the court expressly observed:

> "The court disagrees. . . . McCoy alleges that all defendants conspired to bring 'meritless' charges against him, 'even though said charges were not valid,' and that this conspiracy violated McCoy's due process rights. . . . 'Meritless' and 'invalid charges' could certainly refer to charges based on a rule which failed to give constitutionally

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[83] Appendix G, *infra*

[84] Appendix F, *infra*, at F-7 ¶ 1

[85] Appendix E, *infra*, at E-15, at V. (Emphasis added in part); ER 166, at Fact and Response 44 and 45 (Undisputed Facts)

> adequate notice. Plaintiff is not required to plead in detail every specific fact which constitutes his due process violations. . . . Indeed, defendants were given ample notice of this specific claim in Plaintiff's Amended Opposition to Defendants' Motion to Dismiss.[86]

In response to defendants' having again urged the complaint was barred by *res judicata,* the court further observed, "McCoy is entitled to prove in this action that he should be awarded damages for the defendants' disciplining him under an unconstitutional rule."[87]

The District Court Grants Defendants Summary Judgment

On November 8, 1995 the District Court granted defendants summary judgment on petitioner's second amended complaint.[88] Following a lengthy evidentiary synopsis in which it resolved various factual disputes,[89] the court ultimately ruled "McCoy was not deprived of any alleged property or liberty interests[,]" because he successfully defended himself in the disciplinary proceedings: "As McCoy suffered no final deprivation of property, he suffered no constitutional violation."[90]

Quoting *Zinermon v. Burch,* the court opined that even assuming he had, " '[t]he constitutional violation actionable under § 1983 . . . is not complete unless and until the State fails to provide due process,' " and reasoned "McCoy received more process than the administrative procedures required and more than adequate process to satisfy the due process clause" both pre- and post-discipline, because "[a]

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[86] Appendix E, *infra,* at E-12 ¶ 2-E-13 ¶ 1

[87] *Id.,* at E-13 ¶ 2-E-14 ¶ 1 (Internal footnote omitted)

[88] Appendix D, *infra*

[89] *Id.,* at D-3 through D-14 ¶ 1

[90] *Id.,* at D-20 ¶ 2 through D-21 ¶ 1

post-deprivation judicial hearing provided by state law can cure defects in the pre-termination hearing."[91]

The Ninth Circuit Court of Appeals Affirms The District Court

Rather than address defendants' own continuing course of *conduct,* in affirming the District Court the Ninth Circuit Court of appeals' seven-page memorandum decision grounded its constitutional analysis in the *outcome* of each disciplinary proceeding.[92]

First with respect to the Stonewall Gay Democratic Club disciplinary matter, the Court stated petitioner did not "argue" that "the disciplinary hearing itself was biased or otherwise unfair, or that his constitutional rights were violated by the decision-making body – the Police Commission[:]

> Indeed, the Commission not only refused to discipline him but afforded him *full exoneration.* The question McCoy's complaint raises, therefore, is whether his rights were violated because of unfair actions that led to a disciplinary hearing at which he received *all the relief he requested.*"[93]

With respect to defendants' political and retaliatory motives for pursuing the charges, the Court of Appeal concluded,

> "McCoy has offered *no evidence* that the investigation was conducted or the charges were brought for any constitutionally impermissible purpose, such as racial animus *or retaliation for the exercise*

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[91] *Id.,* at D-21 ¶ 2 through D-26

[92] Appendix A, *infra* (memorandum Opinion)

[93] *Id.,* at A-3 ¶ 2 (Emphasis added) The point was in fact urged and the supporting evidence cited. *See, e.g., Appellant's opening Brief,* at text accompanying notes 147-149 and *Appellant's Reply Brief,* at text accompanying notes 19-24 and 144

> *of a constitutional right*. The *allegation* that 'political concerns' affected Jordan's decision is insufficient to support a due process challenge."[94]

The Court also stated petitioner had made "no showing that the discovery dispute in any way affected the fairness of the *McCoy I* proceeding[,]" and "his *victory* before the Police Commission cured whatever minor deprivation he may have suffered[;]"[95] any "deficiencies" in the investigators' training and supervision "do not rise to the level of a due process violation, and, once again, any infirmities there may have been were *cured* by McCoy's *exoneration* in a fair disciplinary hearing before the Commission."[96]

In summary citing exclusively a 1985 Ninth Circuit case affirming judgment on the pleadings, the Court concluded with respect to the Stonewall Gay Democratic Club disciplinary matter,

> "In short, given all the circumstances of this case, and *particularly* the fact that McCoy was *exonerated* at the administrative hearing, we hold he was neither subjected to pretextual discipline nor arbitrary and capricious governmental conduct, and that he was not deprived of due process of law in connection with the *McCoy I* proceedings."[97]

Turning next to the proceedings on the Bill Paul citizen's complaint, the Court prefaced its analysis with the observation:

> McCoy does not *allege* that his due process rights were violated as a result of the failure of the departmental disciplinary rule to provide adequate notice that his calls to the citizens complainants were improper (*notwithstanding* the *fact* that the

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[94] *Id.*, at A-3 ¶ 3 through A-4 ¶ 1 (Emphasis added)

[95] *Id.*, at A-4 ¶ 2 (Emphasis added)

[96] *Id.*, at A-4 ¶ 3 (Emphasis added)

[97] *Id.*, at A-4 ¶ 4 (Emphasis added) (*Gearhart v. Thorne*, 768 F.2d 1072-74 (9th Cir. 1985))

> California Court of Appeals [sic] *held* the notice to be *inadequate*.)"[98]

The Court considered defendants' document concealment immaterial to the ultimate outcome of the proceedings on the Bill Paul citizen's complaint, and found no material issue of fact in any due process violation in the charges having been pursued, because the evidence "strongly supports the inference that [petitioner] contacted Paul solely to discuss the *McCoy I* complaint."[99]

The Court turned its attention next to petitioner's claim, as the Court described it, "argue[d] for the first time on appeal," that

> "Jordan brought the *McCoy II* charges in retaliation for his exercise of his First Amendment rights in protecting the confidentiality of a juvenile file and in contesting the *McCoy I* charges, and that his First Amendment (*and/or due process*) rights were violated by the bringing of charges to punish him for engaging in such protected conduct."[100]

The Court declined to consider the First Amendment, however, because "McCoy did not *allege* a *First* Amendment violation in his *Complaint*, and because in this case any such claim is fact-dependent . . . ."[101] Nevertheless holding petitioner's "First Amendment and due process claims concerning retaliation also *fail on their merits*," the Court made the observation that,

> "In any event, Jordan's remarks that 'You're only halfway through this,' and 'you still have other charges that you're going to have to face' (McCoy

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[98] *Id.*, at A-5 ¶ 1 (Emphasis added) *But see, e.g.*, text accompanying note 86, *supra*

[99] *Id.*, at A-5 ¶ 3 through A-6 ¶ 2

[100] *Id.*, at A-6 ¶ 3 (Emphasis added) Petitioner in fact cited the Court both to the operative complaint and the prior record in this regard. (*Appellant's Reply Brief*, at text accompanying note 2)

[101] *Id.* (emphasis added)

> Dep. 72:1-4) are insufficient to raise a genuine issue of material fact as to retaliatory motive. They *simply evidence the fact* that Jordan was aware that McCoy was still facing disciplinary charges for his telephone calls to the *McCoy I* citizen complainants, his interrogation of them concerning the charges against him, *and his attempted surreptitious recording of those conversations.*"[102]

In resolving the evidentiary dispute, the Court did not comment on the import of Chief Jordan's additional statement in the same conversation, that Inspector McCoy "should have taken McCoy I."[103]

REASONS FOR WHICH CERTIORARI SHOULD BE GRANTED

Quasi-adjudicatory administrative procedures typically promise much due process in form. In truth, however, they are often entrusted to agencies and officials who deliberately use them for wholly collateral – sometimes corrupt – purposes. The broadly vested power to enact, interpret and enforce vague regulations on amorphous charges is particularly amenable to such abuse. In such circumstances it is entirely predictable that meaningful due process cannot ever actually be provided, because there is no real intent that it should be.

Worse, there will never be any real incentive to provide it, either, when the only constitutional scrutiny ever turned on the process focuses on its outcome rather than the improper conduct itself. After all once an employer takes away a paycheck, the average worker is in no position to *make* his employer give him the rights he has lost. For the average worker deprived of due process, there never will be an all's-well-that-ends-well outcome to the process at all.

Unless it is constitutionally acceptable to require a public employee, or any other citizen for that matter, to use his own resources to *himself* make the government actually provide

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[102] *Id.*, at A-6 ¶ 3 through A-7 ¶ 1 (Emphasis added)

[103] See text accompanying note 72, *supra*

the fair proceedings it promises, due process cannot be afforded – its sufficiency cannot be constitutionally scrutinized – only at the end. If due process is to mean anything at all, it must meaningfully be in place at the beginning, and then meaningfully effected each step along the way.

Petitioner respectfully submits that if governmental misconduct of the nature and duration at issue in this case, is kept from a jury even in part – much less "particularly" – because plaintiff was able to finally put a stop to it, then perhaps after the many years in which federal civil rights jurisprudence has been referring plaintiffs to the state courts, it is necessary for this Court to articulate its own federal due process standard appropriate to the circumstances.

I.

THE NINTH CIRCUIT COURT OF APPEALS' DECISION CANNOT BE RECONCILED WITH THE DECISIONS OF THIS COURT INTERPRETING THE *PARRATT V. TAYLOR* DOCTRINE

While largely if not exclusively through its development of the *Parratt v. Taylor*[104] doctrine this Court appears increasingly to have focused its due process attention on tort remedies as limiting the necessity for federal due process protection, certain due process principles should remain subject to firm federal scrutiny:

First, because a biased proceeding can never be constitutionally adequate, an unbiased forum is a minimal requisite of procedural due process standing independent of the proceedings' ultimate outcome; taint cannot constitutionally be redeemed merely by unbiased review.[105]

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[104] 451 U.S. 527 (1981)

[105] *Ward v. Village of Monroeville,* 409 U.S. 57, 59-60 (1972); *Marshall v. Jerrico* 446 U.S. 238, 241-242 (1980); *Carey v. Piphus,* 435 U.S. 247, 266-67 (1978); *Clements v. Airport Authority of Washoe County,* 69 F.3d 321, 332-34 (9th Cir. 1995); *Haupt v. Dillard,* 17 F.3d 285, 287-88 (9th Cir. 1994). *Compare, Gearhart v. Thorne,* 768 F.2d 1072, 1073 (9th

Second, the procedural due process violation in a case of this nature consists less of a concern with the deprivation itself, than with the fact that state actors were placed in a position deliberately to have effected it. This is not, in short, the random and unauthorized conduct to which the *Parratt v. Taylor* doctrine is applicable. On the contrary the deprivation was predictable, pre-deprivation process was not impossible and defendants were specifically charged with the authority to have provided it.[106]

Third, even as this Court has made it clear that substantive due process has no place in those contexts already addressed by the more explicit constitutional guarantees of the Fourth and Fifth Amendments,[107] along with the Equal Protection Clause it must nevertheless remain the primary constitutional protection against arbitrary governmental conduct in those contexts which are not. After all " '[t]he Due Process Clause of the Fourteenth Amendment was *intended* to prevent government "abusing [its] power, or employing it as a means of oppression." ' "[108]

Finally – and of course the Ninth Circuit does not suggest otherwise – the *Parratt v. Taylor* doctrine is inapplicable to violations of the Bill of Rights, including the First Amendment.[109] And although the Ninth and the Third Circuits differ with respect to whether constitutional protection should be afforded an employee grievance under the Petition Clause,[110] this Court's own and the Ninth Circuit standards are equally solicitous that direct and circumstantial evidence of employer

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Cir. 1985) [no bias claimed]. *See also, Jackson v. Gates,* 975 F.2d 648, 655 (9th Cir. 1992), *cert. den.,* 113 S.Ct. 2996 (1993)

[106] *Zinermon v. Burch,* 494 U.S. 113, 135-38 (1990); *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 432-33 (1982)

[107] *Albright v. Oliver,* 510 U.S. 266 (1994); *Graham v. Connor,* 490 U.S. 386, 395 (1989)

[108] *Collins v. Harker Heights,* 503 U.S. 115, at___, 117 L.Ed 261, at 274 and note 10 (1992) (Emphasis added; citations omitted)

[109] *See generally, Zinermon v. Burch, supra,* 494 U.S at 124-27

[110] *Compare, San Filipo v. Bongiovanni,* 30 F.3d 424, 440 (3rd Cir. 1994), *cert. den.,* 155 S.Ct. 735 (1995) L.Ed.2d 523 (1995) *with Gearhart v. Thorne, supra,* 768 F.2d 1073

retaliation for a public employee's speech on matters of public concern, should survive summary judgment.[111]

Petitioner respectfully submits in view of the foregoing that certiorari is both necessary and appropriate in the circumstances:

Whatever promise of due process the Public Safety Officers Procedural Bill of Rights Act[112] and the San Francisco City Charter[113] may have made in form, the fact remained that the Police Commission, the Chief of Police and the Director of the Office of Citizen Complaints were really all one and the same, respectively serving at the pleasure of the Mayor and the Commission itself.[114] The fact remained the same city attorneys would represent and advise them all.[115]

The fact remained the Chief of Police had political ambitions, a "high profile" homicide and a (usefully) vague unofficer-like conduct regulation;[116] the fact remained that at the time, "some internalized homophobia anyway"[117] was actually considered cause for taking away a career.

The fact remained the harder Inspector McCoy would work to extricate himself from the administrative morass into

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[111] *Waters v. Churchill,* 511 U.S. 661, ___, 128 L.Ed.2d 686, 703-04 (1994); *Clements v. Airport Authority of Washoe County, supra,* 69 F.3d at 334-35; *Lambert v. Richard,* 59 F.3d 134 (9th Cir. 1995), *cert. den.*, 116 S.Ct. 673 (1995); *Johnson v. Multnomah County, Oregon,* 48 F.3d 420 (9th Cir. 1994), *cert. den.*, 115 S.Ct. 2616 (1995)

[112] Appendix M, *infra,* at M-1 through M-2

[113] Appendix M, *infra,* at M-6, at Section 3.530-2 ¶ 3 and at M-6 through M-7, at Section 8.343 ¶ 2

[114] Appendix M, *infra,* at M-5, at Sections 3.500(a), 3.530 and 3.532; at M-6, at Section 3.530-2 ¶ 1

[115] Appendix Q, *infra,* at Q-7-Q-10 (Morley Deposition); Appendix R, *infra* (Morley Correspondence); Appendix S, *infra* (Morley Correspondence)

[116] Apendix M, *infra,* at M-7

[117] Appendix O, *infra,* at 0-5 (Shockey Deposition)

which his personal and professional reputation had been thrown, the worse the process was made.[118]

And of course ultimately, the fact remains the Ninth Circuit Court of Appeals considers none of this to be arbitrary, capricious, pretextual or retaliatory conduct worthy of constitutional admonition, because Inspector McCoy was "fully exonerated" when charges were dismissed at the end of a process one Police Commissioner described as a "charade,"[119] and because inadequate notice notwithstanding, it was improper for him to have telephoned Bill Paul in any event.[120]

Petitioner respectfully submits in closing that the Court of Appeals' decision is mistaken, and inconsistent with the decisions of this Court properly interpreting the *Parratt v. Taylor* doctrine; petitioner in turn seeks this Court's order granting review on certiorari, and the opportunity further to brief the merits of his case before the Court.

Respectfully submitted,

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[118] Appendix J, *infra*, at J-12 (Court of Appeal Opinion); Appendix T, *infra* (McCoy Deposition)

[119] Appendix L, *infra*, at L-5 ¶ 5 (Police Commission Resolution)

[120] Appendix A, infra, at A-5 ¶ 3 through A-6 ¶ 1 and note 1 (Court of Appeals Opinion); Appendix B, *infra* (Post-Oral Argument Order). The original charge against Inspector McCoy relating to the tape-recording was dropped. *(See and compare,* ER 162, Exhibit A, at Exhibit 7, and ER 26 at Exhibit A)

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANK MCCOY, Plaintiff-Appellant, v. SAN FRANCISCO, CITY & COUNTY, a Municipal Corp.; OFFICE OF CITIZEN COMPLAINTS, a Public Entity Department of the City and County of San Francisco; FRANK JORDAN, Individually and in his official capacity as Chief of Police of the San Francisco Police Dept.; MICHAEL LANGER, Individually and in his official capacity as Chief Investigator of the Office of Citizen Complaints; DANIEL J. SILVA, Individually and in his official capacity as Chief Investigator of the Office of Citizen Complaints; LAWRENCE SHOCKEY, Individually and in his official capacity as Special Investigator of the Office of Citizen	No. 95-17328 D.C. No. CV-91-02856-SC **MEMORANDUM*** (Filed Jan. 21, 1997)

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Complaints; MICHAEL GASH, Individually and in his official capacity as Attorney for the San Francisco Police Dept.; MIRIAM MORLEY, Individually and in her official capacity as Deputy City Attorney; ARTHUR HARTINGER, Individually and in his official capacity as Deputy City Attorney,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of California
Samuel Conti, District Judge, Presiding

Argued and Submitted December 10, 1996
San Francisco, California

Before: BOOCHEVER, REINHARDT, and RYMER, Circuit Judges.

In this action, McCoy, a former homicide inspector with the San Francisco Police Department, alleges that his constitutional rights were violated in the course of two separate disciplinary actions brought against him. He appeals the district court's grant of summary judgment in favor of defendants. We consider each of his claims in turn, and conclude that, viewing the evidence in the light most favorable to him, the grant of summary judgment was proper.

I. The *McCoy I* Proceedings

McCoy alleges that his Fourteenth Amendment due process rights were violated in several respects during the investigation and administrative proceedings that preceded the hearing on the charges against him (*McCoy I*). McCoy claims that the police department's internal investigative procedures were conducted negligently or in a biased fashion, and that then-Police Chief Jordan wrongly based the decision to charge him on those flawed investigations.

"A biased proceeding is not a procedurally adequate one," and bias in an administrative adjudication cannot be "cured" by subsequent judicial review. *Clements v. Airport Authority*, 69 F.3d 321, 333 (9th Cir. 1995). Here, however, McCoy does not argue that the disciplinary hearing itself was biased or otherwise unfair, or that his constitutional rights were violated by the decision-making body – the Police Commission. Indeed, the Commission not only refused to discipline him but afforded him full exoneration. The question McCoy's complaint raises, therefore, is whether his rights were violated because of unfair actions that led to a disciplinary hearing at which he received all the relief he requested.

Specifically, McCoy alleges that Jordan violated his due process rights because the decisions to investigate the citizen complaints and to charge him with misconduct (despite the conclusions by certain entities within the department that no "chargeable" misconduct occurred) were motivated by malice or by "political" concerns. The record does not support any such inference, however. McCoy has offered no evidence that the investigation was

conducted or the charges were brought for any constitutionally impermissible purpose, such as racial animus or retaliation for the exercise of a constitutional right. The allegation that "political concerns" affected Jordan's decision is insufficient to support a due process challenge.

McCoy further alleges in his complaint that defendants Morley, Gash, and Hartinger violated his due process rights during the *McCoy I* discovery disputes. He does not raise that issue on appeal, however, and, in any event, he has failed to show that injury he might have suffered from those alleged violations. Specifically, he makes no showing that the discovery dispute in any way affected the fairness of the *McCoy I* proceeding. Finally, his victory before the Police Commission cured whatever minor deprivation he may have suffered.

McCoy also alleges that his due process rights were violated because the citizen complaint investigators were improperly trained and/or supervised. In view of all the circumstances, we conclude that any deficiencies in the training or supervision of the investigators do not rise to the level of a due process violation and, once again, any infirmities there may have been were cured by McCoy's exoneration in a fair disciplinary hearing before the Police Commission.

In short, given all the circumstances of this case, and particularly the fact that McCoy was exonerated at the administrative hearing, we hold that he was neither subjected to pretextual discipline nor arbitrary and capricious governmental conduct, and that he was not deprived of due process of law in connection with the *McCoy I* proceedings. *See Gearhart v. Thorne*, 768 F.2d 1072, 1073-74 (9th Cir. 1985).

II. The *McCoy II* Proceedings

In the part of his complaint relating to *McCoy II*, McCoy does not allege that his due process rights were violated as a result of the failure of the departmental disciplinary rule to provide adequate notice that his calls to the citizen complainants were improper (notwithstanding the fact that the California Court of Appeals held the notice to be inadequate). Instead, he complains that the defendants violated his rights by concealing or destroying documents subject to discovery, by concealing evidence, by "manufacturing false evidence," and by willfully and maliciously bringing false charges against him.

As to the concealing or destroying of documents, McCoy concedes that prior to *McCoy I*, all such evidence was disclosed by one means or another, except that he did not obtain a complete copy of the statement he prepared and gave to Lt. McCarthy. However, he fails to show how his inability to obtain the missing portions of the statement affected the *McCoy II* proceedings, and thus fails to raise any genuine issue of material fact regarding the alleged deprivation of his due process rights. Likewise, he presents no evidence that defendants manufactured false evidence against him, and therefore fails to raise a genuine issue of material fact with respect to that allegation.

McCoy's claim that defendants brought false charges against him appears to relate to *McCoy I* rather than to *McCoy II*. Even assuming that it relates to *McCoy II*, however, he offers no evidence that the charges were false or that he was subjected to arbitrary and capricious

government conduct. He admits that he telephoned Paul and Newquist, and that he attempted to record those conversations. While he argues that the calls were made as part of the ongoing homicide investigation, the transcript of his remarks to Paul belies that claim and strongly supports the inference that he contacted Paul solely to discuss the *McCoy I* complaint. Therefore, he fails to raise a genuine issue of material fact that the charges were false.[1]

Upon review of the entire record, therefore, we conclude that McCoy failed to raise a genuine issue of material fact as to any alleged due process violation.

Finally, we note that McCoy argues for the first time on appeal that Jordan brought the *McCoy II* charges in retaliation for his exercise of his First Amendment rights in protecting the confidentiality of a juvenile file and in contesting the *McCoy I* charges, and that his First Amendment (and/or due process) rights were violated by the bringing of charges to punish him for engaging in such protected conduct. Because McCoy did not allege a First Amendment violation in his complaint, and because in this case any such claim is fact-dependent, and does not involve a pure question of law, we do not consider it here. In any event, Jordan's remarks that "You're only halfway through this," and "you still have other charges that you're going to have to face" (McCoy Dep. 72:1-4)

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[1] Were we to construe McCoy's complaint as alleging that it would be improper for a police department to prohibit the making of such calls, we would reject his contention. We have no doubt that the conduct involved is not consistent with the proper handling of citizen complaints.

are insufficient to raise a genuine issue of material fact as to retaliatory motive. They simply evidence the fact that Jordan was aware that McCoy was still facing disciplinary charges for his telephone calls to the *McCoy I* citizen complainants, his interrogation of them concerning the charges against him, and his attempted surreptitious recording of those conversations. Therefore, McCoy's First Amendment and due process claims concerning retaliation also fail on the merits.

III. Conclusion

For the foregoing reasons, the district court's grant of summary judgment in favor of the defendants is

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANK McCOY, Plaintiff/Appellant, vs. CITY AND COUNTY OF SAN FRANCISCO, etc., et al., Defendants/Appellees.	No. 95-17328 DC# CV-91-02856-SC Northern California (San Francisco) ORDER (Filed Dec. 12, 1996)

The parties may submit letter briefs of no more than two pages, addressing the single issue of the effect of *Rattray v. City of National City*, 51 F.3d 793, on this case. The briefs shall be filed with the clerk on or before December 19, 1996.

For the Court:

CATHY A. CATTERSON
Clerk of Court

/s/ Miriam Mueller
Miriam Mueller
Deputy Clerk

op/mlm

court/12.96

APPENDIX C

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

FRANK McCOY, Plaintiff, v. THE CITY AND COUNTY OF SAN FRANCISCO, et al., Defendants.	No. C 91-2856 SC JUDGMENT (Filed Nov. 8, 1995)

In accordance with the Order granting defendants' Motion for Summary Judgment issued on November 7, 1995, it is hereby ORDERED, ADJUDGED, and DECREED that judgment be entered in favor of defendants and against plaintiff. Plaintiff shall take nothing on the complaint.

IT IS SO ORDERED.

Dated: November 7, 1995.

/s/ Samuel Conti
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

FRANK McCOY, Plaintiff, v. THE CITY AND COUNTY OF SAN FRANCISCO, et al., Defendants.	No. C 91-2856 SC ORDER RE: DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (Filed Nov. 8, 1995)

I. INTRODUCTION

This case involves plaintiff Frank McCoy's allegations of deprivation of due process against the City and County of San Francisco ("City") and a vast array of individual defendants, including then-police chief Frank Jordan ("Jordan"), Michael Langer ("Langer"), Daniel Silva ("Silva"), Lawrence Shockey ("Shockey"), Michael Gash ("Gash"), Mariam Morley ("Morley"), and Arthur Hartinger ("Hartinger") (hereinafter collectively referred to as "individual defendants" unless otherwise specified), investigators and attorneys involved in hearings regarding the competency of a murder investigation undertaken by plaintiff, Frank McCoy ("McCoy), an inspector with the San Francisco Police Department ("SFPD"). This case is presently before the court on defendants' motion for summary judgment, partial summary judgment and qualified immunity.

II. LEGAL STANDARD

Summary judgment is proper only when there is no genuine issue of material fact and, when viewing the evidence in the light most favorable to the non-moving party, the movant is clearly entitled to prevail as a matter of law. Fed. R. Civ. P. 56(c); *Jung v. FMC Corp.*, 755 F.2d 708, 710 (9th Cir. 1985). Once a summary judgment motion is made and properly supported, the adverse party may not rest on the mere allegations of his pleadings, but must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Celotex Corp. v. Myrtle Nell Catrett*, 477 U.S. 317 (1986). In addition, to withstand a motion for summary judgment, the non-moving party must show that there are "genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). If the factual context makes the non-moving party's claim implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). No longer can it be argued that any disagreement about a material issue of fact precludes the use of summary judgment. *California Architectural Building Products, Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987).

Bearing in mind that the evidence should be viewed in the light most favorable to McCoy, as the non-moving party, the relevant facts are summarized below.

III. FACTS

A. McCoy I.

On the night of November 28, 1987, SFPD Inspector Antonio Casillas responded to the scene of a reported stabbing and arrested a juvenile suspect. The victim, George Smoot, died two hours later as a result of the stabbing. McCoy and his partner were assigned to the investigation after Smoot's death. While his partner reported to the murder scene that evening, McCoy interviewed the detained suspect at the Hall of Justice. The suspect admitted to stabbing Smoot, but alleged it was in response to Smoot's attempted molestation of himself and attack on his little sister. As a result of their investigation, the suspect was charged, tried, and convicted of manslaughter, as opposed to murder.

During the course of the investigation, a number of newspaper articles were published voicing concerns about the adequacy and competency of the investigation. Specifically, the articles expressed the gay community's concern that the victim's homosexuality may have caused the SFPD generally, and McCoy specifically, to conduct a biased and incomplete homicide investigation.

As a result of the community's outcry, Chief Jordan agreed to attend a community meeting. Prior to the meeting, questions regarding the ongoing investigation were sent down through the chain of command from Chief Jordan to McCoy. McCoy initially refused to answer these questions because he believed that Jordan would publicly release his answers to placate gay community activists that were pressuring him about the investigation and that

doing so would be illegal because they concerned a juvenile proceeding. Although he eventually provided written answers, including his objections to any disclosure, to his supervisor, Lt. McCarthy, McCoy claims that his initial refusal, in part, prompted the future investigations of his actions by the Office of Citizen Complaints ("OCC")[1] (described *infra*).[2] Jordan denies that he knew of McCoy's objection to the questionaire or that this objection motivated his disciplinary action. McCarthy does not recall McCoy raising any objections, as well.

Between April 8, 1988, and August 29, 1990, Bill Paul ("Paul"), one of the journalists who had been publicly critical of the investigation, filed two complaints with the OCC against McCoy. Paul had no direct knowledge of the Smoot homicide.

The first complaint ("McCoy I"), alleged against McCoy and others conducting the investigation in the Smoot case, contained four general allegations: (1) "neglect of duty," in that the investigation of the killing

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[1] The San Francisco Charter requires the OCC to promptly, fairly, and impartially investigate all complaints of police misconduct or dereliction of duty. The OCC's role is investigative, not prosecutorial. Upon concluding an investigation, it recommends disciplinary action for complaints it considers well-founded. The Police Chief then makes the decision to prosecute, which is handled by his office.

[2] According to McCoy, the other alleged motive for the disciplinary proceedings was that Jordan was trying to ingratiate himself to the gay community by taking action against McCoy. McCoy bases this allegation on representations made to him by his superiors that this was a political case that was out of their control even though it was meritless.

was inadequate; (2) "unwarranted action," in that the seizure of Smoot's diary was improper; (3) "conduct reflecting discredit on the SFPD," in that loud laughter emanating from Smoot's home shortly after the killing was improper; and (4) "sexual slur," in that the laughter and inadequacy of the investigation may have been due to Smoot's homosexuality.

The investigation of this complaint was assigned to defendant Shockey, an investigator at the OCC. McCoy claims that although Shockey was biased and untrained, defendants Langer and Silva, aware of these facts, assigned him to the investigation because he was homosexual and the case involved allegations of homophobia. According to McCoy, Shockey's prior performance evaluations were critical of his ability, he was not a "special investigator," and he never investigated a homicide. Moreover, he had not been trained for this type of investigation as OCC had not instituted a formal training program.

The OCC assigned the case to Shockey because they claimed he was "OCC's 'special investigator' in charge of complex cases" and that Shockey was one of the OCC's most experienced investigators. While Shockey had taken no courses in homicide investigation, Shockey received training from the SFPD's Internal Affairs division. Shockey attended courses in interrogation and interview techniques and internal affairs certified by the Peace Officers Standards and Training, the organization in California that trains police officers. Furthermore, OCC investigators, including Shockey, are paired with an internal affairs agent when they first join OCC, and Shockey "worked in conjunction with [his agent] on occasions."

Shockey's investigation lasted approximately two months and included interviews of fourteen police officers, seven civilians, and three criminalists. He reviewed hundreds of documents including the SFPD Incident Report and the Coroner's Report, newspaper articles and news broadcasts, crime scene photographs and audiotapes provided by the homicide division. He visited and videotaped the crime scene.

Shockey issued a report sustaining the sexual slur misconduct and neglect of duty charges. Specifically, he found that (1) McCoy, along with others, had conducted an inadequate investigation; (2) the laughter at the scene was inappropriate, but he could not determine the responsible party; (3) seizure of the diary was proper; and (4) the inadequate investigation may have been due to Smoot's status as a gay man. The last charge was sustained because Shockey felt that the inspectors' investigation improperly focused on the suspect's allegations of molestation and evidenced strong preconceptions relating to the sexual practices and behaviors of homosexual men.

McCoy makes several arguments as to why Shockey's investigation and subsequent report were inadequate. First, McCoy alleges that Shockey's investigation was inadequate because, according to McCoy, the only two officers from the homicide detail interviewed by Shockey were McCoy and Dean, the other accused officer. Shockey did not speak with any ranking SFPD officers who had been in charge of homicide or who were familiar with homicide procedures. Moreover, Shockey did not interview Bill Paul, the complainant. Most importantly, Shockey failed to interview key witnesses, such as Lt.

McCarthy, McCoy's supervisor, who filed a written report with the SFPD's homicide detail finding no evidence of wrongdoing in the Smoot investigation. Finally, Shockey did not review McCarthy's report.

McCoy also alleges that Shockey's report was inadequate. The report did not sustain the "conduct reflecting discredit" charge because Shockey was unable to identify the party responsible for the laughter. Yet, McCoy argues that the report should have explicitly exonerated him of this charge because Shockey knew that McCoy had not reported to the scene and thus knew McCoy could not have been responsible for any inappropriate laughter. Furthermore, McCoy contends the report was inadequate because it did not include the no wrongdoing and no anti-homosexual bias findings in McCarthy's report. McCoy alleges that Shockey knew or should have known of the existence of the McCarthy report exonerating McCoy and that, at the very least, it should have been included in any OCC report sustaining the other two charges.

The Shockey report was approved by defendants Langer (OCC Director) and Silva (Shockey's supervisor), allegedly with a willful and malicious intent to injure McCoy. Chief Jordan then ordered SFPD's Management Control Division ("MCD") to conduct its own investigation, which was simply a review of the OCC investigation. Despite the fact that a number of serious deficiencies with the criminal investigation were revealed, MCD determined that the OCC investigation produced no evidence of chargeable misconduct and recommended that no charges be sustained. Specifically, MCD noted that the OCC failed to explore the fact that at

least several of the steps left undone in the investigation that formed the basis of the "neglect of duty charge" may actually have been the result of the McCoy's expertise and experience. Moreover, as to the sexual slur allegation, the MCD concluded that the lifestyle of the victim is a legitimate and proper subject of investigation and any perceived preconceptions relative to the sexual practices and behaviors of homosexual men were subject to interpretation. Langer and Shockey disagreed with the MCD's findings, insisting that the evidence supported a case of homophobia. Despite McCoy's argument to the contrary, Jordan contends that he did consider the MCD report prior to reaching his disciplinary decision.

Based on the OCC report, Chief Jordan charged McCoy before the Police Commission. Jordan was aware that some members of the SFPD disagreed with the OCC's findings, but he believed the OCC conducted a thorough investigation and that the charges warranted a hearing. Evidentiary hearings were convened beginning March 15, 1989, and lasted through the year. The charges were ultimately dismissed by the Police Commission.

B. The McCoy I Discovery Disputes

McCoy alleges violations of due process resulting from, *inter alia*, discovery disputes during the course of the McCoy I proceedings.

First, McCoy alleges that the OCC and the SFPD declined to produce documents subpoenaed by McCoy despite an OCC regulation requiring such action. Gash, the SFPD's attorney, claims that the discovery request sought documents that were not relevant to the charges

and that he provided McCoy with all the information on which the charges were based and all relevant documents in his possession. McCoy went to court to obtain these subpoenaed documents and ultimately, OCC and SFPD disclosed additional documents, though without an explicit court directive to do so.

Second, McCoy alleges a due process violation because Shockey's interview notes were knowingly concealed by the OCC and the SFPD. When the Commission hearings began, Gash, Morley, Hartinger, and Langer all insisted that no additional documents existed. However, shortly after the Commission hearings began, it was revealed that Shockey had written investigative notes which had not been disclosed to McCoy. Gash, Morley, and Hartinger all assert that prior to the hearings they believed that all relevant documents in OCC and SFPD's possession had been turned over and were equally surprised at the revelation regarding the investigative notes. When the existence of these notes were revealed at the hearing, Gash claimed that they no longer existed because, as the tape recordings provided the best evidence of the interviews and important points were included in his report, Shockey's standard practice was to destroy the written notes. Shockey then testified before the Police Commission that his interview notes were in the OCC file. Now Shockey claims that the Police Commission question confused him. Shockey's current declaration submitted with the summary judgment motion clarifies that he kept the written notes in the investigative file only while it was active. Once an investigation was closed it was his standard practice to purge the file of his notes. However, instead of destroying them he claims

that he must have placed them in his desk, arguing that they could not have remained in the file because other people who reviewed the file did not see them.

In any event, the City argues that the notes were almost exclusively taken from taped interviews that had been produced and portions Shockey considered relevant had been included in his report. Moreover, McCoy received the 110 documents, primarily Shockey's notes, six months before the conclusion of the hearing.

Third, McCoy alleges a due process violation in that the City has still not fully produced all documents in its possession as it has not provided McCoy answers to Jordan's questions regarding the initial murder investigation. McCoy's Chronological Report of Investigation, written at the time of the investigation, verifies that on March 14, 1987, Lt. McCarthy ordered McCoy to prepare answers to Chief Jordan's questions. Lt. McCarthy substantiates that he passed questions from Jordan to McCoy. McCoy is only able to recall some of the questions asked, but does remember that there were three pages of questions and answers. According to McCoy's recollection, Jordan asked about the diary seized by police; who recommended the justifiable homicide charge; whether all witnesses were interviewed the night of the murder; whether the suspect's sister lied about the molestation; whether the crime lab examined the suspect's house; and whether any inspectors referred to the victim as a sexual deviant. One of the three pages of McCoy's written answers was, at the time of its creation, given to and subsequently produced by Inspector Casillas. McCoy's recollection coincides with the questions found on the

one page of questions and answers that has been discovered. No evidence has been put forth contradicting McCoy's story. Jordan recalls asking for information relating to the homicide investigation, though he does not recall whether he received the document in written form or what happened to it. He does state that it would not be unusual to discard it or file it. Consequently, the court accepts that McCoy did in fact provide written answers to Jordan's questions.

Jordan denies withholding or concealing the document. Gash, Morley, and Hartinger claim they have never seen it. While McCoy's answers contain no new information, McCoy claims the document itself is exculpatory in that its existence, timing, and content provide a full explanation of the facts prior to any charges or investigations, thereby corroborating his version of events.

C. McCoy II

A second OCC complaint was filed by Paul against McCoy on May 18, 1988 ("McCoy II"), alleging that on May 17, 1988, McCoy had improperly called Paul on the telephone to question him about statements Paul had made about the pending OCC complaint. The complaint contained three allegations, two for unwarranted action stemming from contacting an OCC complainant and from secretly taping the conversation and one allegation of neglect of duty for refusing to turn over copies of the tape to Silva of the OCC.

McCoy contends that the call was made as part of the active investigation of the Smoot homicide. First, he

argues that although the call was made after the manslaughter conviction, it occurred prior to sentencing and was necessary to respond to the new trial motion brought by the defendant. Second, he argued that any questions specifically relating to the OCC complaint were critical to the Smoot prosecution in that public challenges to the credibility of the police officers involved in the investigation would impact the prosecution.

At the time of the telephone interview, SFPD had no explicit rule, regulation, or order prohibiting telephone interviews with OCC complainants. McCoy claims that he advised his superior, McCarthy, of the call and was not criticized for it. The tape was placed in the homicide file. When questioned about the call by Silva of the OCC, McCoy in the presence of his partner, Dean, and McCarthy, offered to make the tape available to Silva, who reportedly refused. Silva requested a copy of the tape the next day, May 18, but McCoy refused because after Silva's previous conduct, "he was not about to turn over any evidence over to a person with the type of practices which he displayed." Silva does not recall any offer of the tape, but both witnesses corroborate McCoy's version.

The McCoy II complaint was assigned to Barbara Attard, a senior OCC investigator who McCoy claims had less training and experience than Shockey. Attard attended courses in internal affairs investigation, homicide investigation, and criminal investigation, in addition to the informal training received from other OCC investigators during the initial stage of her employment. As part of the investigation, she interviewed Silva, who told her that McCoy did not offer to make the Paul conversation tape available to him. She also interviewed McCarthy,

who told her that McCoy had not violated any rules, though he would have advised against the call had McCoy asked, and that McCoy had offered Silva the tape. Attard interviewed Dean as well, who also heard McCoy offer the tape and stated that it is the general practice in the Homicide Division to tape conversations, and only sometimes is consent requested.

On October 14, 1988, based on the tape recordings McCoy made of the conversation between himself and Paul, the OCC sustained all three of the McCoy II charges. The OCC sustained the unwarranted action in calling the OCC complainant charge concluding that the telephone conversation focused primarily on the McCoy I investigation, not the homicide investigation. Attard's OCC report, approved by Langer and forwarded to Jordan, also sustained the second unwarranted action allegation because, as the call was primarily an inquiry into the OCC complaint, not the homicide investigation, it was improper for McCoy to surreptitiously tape the conversation. Finally, the neglect of duty charge was upheld because, regardless of whether McCoy offered the tape to Silva on May 17, 1988, it was improper to refuse to give it to Silva when he requested it at a later date.

Jordan concluded that McCoy's conduct violated General Order D-1, Rule A-9, which prohibits any conduct that reflects discredit upon the Department. McCoy alleges that Jordan took this action in retaliation for McCoy having successfully defended himself in McCoy I. As proof, McCoy points to a conversation that took place on the night the Police Commission dismissed the McCoy I charges. According to McCoy, Jordan told him that "you're only halfway through this" because of the McCoy

II charges. Furthermore, McCoy alleges that Jordan told him he "should have taken McCoy I," which McCoy interpreted to mean that he should not have fought the McCoy I charges. McCoy argues that this is evidence of Jordan's retaliatory intent in pursuing McCoy II. Jordan denies he made any threatening statements or any statement that McCoy I would have any bearing on his decision in McCoy II.

Chief Jordan ordered that McCoy serve a two day suspension for the McCoy II unwarranted action charge of contacting an OCC complainant. McCoy subsequently requested that Jordan's order of suspension be reviewed by the full Police Commission. The Police Commission sustained Chief Jordan's action in McCoy II on August 29, 1990, finding that McCoy's phone call to Paul had violated an internal rule of the police department. McCoy served his suspension on November 28 and 29, 1990. McCoy alleges that the suspension and the findings and conclusions adopted by the Police Commission and placed in his personnel file negatively affected his promotion opportunities within the SFPD and damaged his name and reputation as a police investigator.

McCoy then petitioned the Superior Court for a writ of administrative mandamus and a request for declaratory relief. McCoy named as defendants in the state court action the Police Commission, Chief of Police Willis Casey, former Chief of Police Frank Jordan, and the City and County of San Francisco.[3] McCoy requested that the

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[3] Individual defendants were named only in their official capacity.

Commission be ordered to set aside his disciplinary proceedings, to restore benefits and back pay, and to remove documentation in his file relating to the proceeding. He also requested that the rule which he was suspended for violating be declared unconstitutional on its face and as applied to McCoy. The trial court denied his motion, but McCoy appealed and the California Court of Appeal, on October 18, 1993, reversed the trial court, granting all of McCoy's requested relief, except they found the rule unconstitutional only as applied to McCoy, not on its face.

D. The present action

The present action was brought in federal court on September 3, 1991. McCoy has named as defendants in this action the City and County of San Francisco; the Police Commission; the OCC; former Chief of Police Jordan, who brought charges against McCoy on both McCoy I and McCoy II; OCC Investigator Shockey, the investigator assigned to investigate McCoy I; Silva, Shockey's supervisor who reviewed and approved Shockey's report recommending disciplinary action against McCoy in McCoy I; OCC Director, Langer, who also reviewed and approved Shockey's report; Gash, an attorney employed by the SFPD who presented the charges against McCoy in McCoy I to the Police Commission; Deputy City Attorney Morley who was assigned to provide advice to the OCC and the Police Commission during the McCoy I discovery disputes; and Deputy City Attorney Hartinger who was assigned to litigate the discovery disputes when McCoy decided to pursue his discovery requests through federal

and state court rather than through the Police Commission.

McCoy alleges various violations of his due process rights under 42 U.S.C. § 1983. Specifically, McCoy alleges (1) that defendants Langer, Silva, Shockey, and the City conducted an "unconstitutionally inadequate investigation;" (2) that defendants Jordan and the City pursued "unconstitutional disciplinary action;" (3) that defendants Gash, Morley, and Hartinger violated McCoy's due process rights during discovery disputes in McCoy I; and (4) that all defendants conspired for the purposes of bringing meritless disciplinary charges against McCoy.

IV. ANALYSIS

Defendants makes [sic] several arguments in support of their summary judgment motion. Defendants argue that any actions that occurred prior to September 3, 1990 should be dismissed because they are barred by the one-year statute of limitations applicable to such claims in California. Alternatively, defendants contend that this action should be dismissed because McCoy fails to satisfy the elements of a §1983 claim, specifically, that he was deprived of a property or liberty interest without due process of law.[4]

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[4] The City and individual defendants also raised numerous factually specific § 1983 and qualified immunity arguments in support of their motions for summary judgment. The court need not address these claims because, as discussed *infra*, plaintiff is unable to establish a prima facie § 1983 claim against all the defendants.

A. Statute of Limitations

In 1992, this court dismissed McCoy's complaint holding that the statute of limitations applicable in this case was one year and began running when the Police Commission announced its decision on August 29, 1990. Thus, the court held that his claims were barred by the one year statute of limitations because McCoy filed his claim on September 3, 1991.

The Ninth Circuit reversed, affirming that the statute of limitations was one year, but concluding that the statute did not begin to run until September 13, 1990, the date the Police Commission issued its final written decision in McCoy II.

Defendants allege that while the Ninth Circuit ruling allows all claims arising from McCoy II, McCoy I claims are still time barred because that proceeding terminated more than one year before the suit was filed, January 3, 1990, when the Police Commission adopted the officer's motion dismissing the charges. Consequently, McCoy's first and third claims should be dismissed because they are based on Shockey's investigation of McCoy I and the related discovery disputes, both of which arose solely out of and are entirely dependent on McCoy I. Plaintiff counters that McCoy I and II are not separate events, but rather are terms that "describe a chain of events wherein the disciplinary process was manipulated for the purpose of harming McCoy."

The Ninth Circuit never expressly stated whether McCoy I and II were separate incidents. However, the Ninth Circuit reversed and remanded the dismissal of all claims based on its conclusion that the statute did not toll

until September 13, 1990, the date the Police Commission issued its final written decision in McCoy II. Accordingly, this court concludes that the Ninth Circuit's decision to reverse the dismissal of all four claims based on the September 13th date supports a holding that the first and third causes of action are not barred by the statute of limitations.

B. Failure to satisfy the elements of a § 1983 claim.

Section 1983 provides that every person who, under color of law, deprives another of rights protected by the Constitution shall be liable to that party. 42 U.S.C. § 1983. "Section 1983 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.' " *Albright v. Oliver*, 127 L.Ed 2d 114, 122 (1994). "The initial inquiry must focus on whether the two essential elements of a § 1983 action are present: (1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of the rights, privileges, or immunities secured by the Constitution . . . of the United States." *Parratt v. Taylor*, 451 U.S. 527, 535 (1981). It is undisputed that the conduct complained of was committed by "persons" acting under color of state law.

As for the second element, McCoy contends that his constitutional right not to be deprived of property or liberty without due process of law under the Fourteenth Amendment was violated by the city and the individual defendants when the SFPD suspended him pursuant to a regulation that was later found to be unconstitutionally

vague as applied. The City and the individual defendants contend that all four § 1983 causes of action should be dismissed because McCoy fails to satisfy an essential element of this claim in that McCoy deprived of a federally protected constitutional right without due process.

The second element implicitly requires McCoy to establish a constitutionally protected right prior to arguing its deprivation. According to McCoy, the SFPD action implicates property or liberty rights protected under the Fourteenth Amendment that require due process prior to their deprivation. Property interests "are created and their dimensions are defined by existing rules or understandings that stem from . . . state law." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) McCoy claims that, under California law, he was vested with a property interest in both his continued employment and the emoluments of office, including rank, because he was a non-probationary employee of the SFPD subject to discipline only for cause. *Civil Service Assn v. City and County of San Francisco*, 22 Cal.3d 552, 560 (1978). McCoy further claims that this interest extends beyond lost wages and benefits but also to any ensuing damage to his future career opportunities. In addition, McCoy argues that he has a recognized protected liberty interest because he suffered a reputational harm coupled with an employment interest. *Paul v. Davis*, 424 U.S. 693 (1976). McCoy alleges that the suspension and the placement in his personnel file of the findings and conclusions adopted by the Police Commission negatively affected his promotion opportunities within the SFPD and damaged his name and reputation as a police investigator. Consequently, McCoy argues that the SFPD actions implicated property and liberty interests, entitling

him to the constitutional protections of the due process clause. It is not necessary for the court to decide whether these property or liberty rights do in fact exist under law. Rather, for purposes of this motion, the court will assume that plaintiff has established a constitutionally protected property and/or liberty right.

Once the constitutionally protected right is established, "to prove a violation of procedural due process McCoy must show that: (1) the deprivation occurred; (2) that the deprivation occurred without due process of law; and, (3) that the defendants subjected him to the deprivation." *Toney-el v. Franzen*, 777 F.2d 1224, 1227 (7th Cir. 1985). Similarly, the Court has delineated almost identical criteria for determining a due process violation asserted directly against a municipality. "Two different issues [are presented] when a § 1983 claim is asserted against a municipality: (1) whether plaintiff's harm was caused by a constitutional violation, and (2) if so, whether the city is responsible for that violation." *Collins v. City of Harker Heights*, 117 L.Ed 2d 261, 270. McCoy must satisfy the threshold burden of proving that he was deprived of a constitutionally protected right without due process of law before the court will address whether any of the defendants are responsible for such deprivation.

McCoy was not deprived of any alleged property or liberty interests. In McCoy I, no discipline was ever imposed and the charges were dismissed by the Police Commission. As such, there was no deprivation of rights related to McCoy I. While a two-day suspension was imposed in McCoy II, which forms the basis of McCoy's allegation that he was deprived of a property interest, that suspension was overruled by the California Court of

Appeals. McCoy recovered his benefits and lost back pay, was reinstated, and his record was purged. As McCoy suffered no final deprivation of property, he suffered no constitutional violation.

Moreover, even if the court accepted that McCoy actually suffered a deprivation of these aforementioned rights, he failed to prove the deprivation occurred without due process of law. "The constitutional violation actionable under § 1983 is not complete when the violation occurs; it is not complete unless and until the State fails to provide due process." *Zinermon v. Burch*, 494 U.S. 113, 126 (1990). "Due process 'calls for such procedural protection as the situation demands.' " *Toney-El*, 777 F.2d at 1227. To determine whether constitutionally adequate process was provided, the court looks to what process is required, asks "what process the state provided and whether it was constitutionally adequate." *Zinermon*, 494 U.S. at 126.

The required procedures for actions affecting tenured public employment, some form of pre-termination hearing at a meaningful time with notice and an opportunity to be heard, is equally applicable to terminations or suspensions. In *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1984), the court delineated the minimum process required to terminate a tenured public employee without violating the due process clause of the Fourteenth Amendment. The tenured employee is entitled to something less than a formal evidentiary hearing, particularly when state law provides for judicial review. *Id.* at 545. The hearing need only provide "notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." *Id.* at

546. Due process does not grant the employee the right to examine and review all documentary evidence. *Cholewin v. City of Evanston*, 899 F.2d 687, 689-90 (7th Cir. 1990). As this process is adequate for termination of tenured public employees, similar process is more than sufficient when the court is faced with a two day suspension of a public employee.

Once the due process requirements are established the court examines "the procedural safeguards built into the . . . administrative procedure effecting the deprivation, and any remedies for erroneous deprivations provided by statute." *Zinermon*, 494 U.S. at 126. The San Francisco Charter requires the OCC to promptly, fairly, and impartially investigate all complaints of police misconduct or dereliction of duty. Upon concluding an investigation, the OCC recommends disciplinary action for those complaints it considers well-founded. The Police Chief then makes the decision whether to prosecute. The Public Safety Officers Procedural Bill of Rights Act protects "peace officers from abusive or arbitrary treatment in their employment." *Pasadena Police Officers Assn. v. City of Pasadena*, 51 Cal.3d 564, 577 (1990). Protections provided officers under this Act include a requirement that law enforcement agencies disclose reports and complaints to the charged officer, *id.* [sic] at 579; Cal Govt. Code § 3303(f), and that the officer is entitled to an administrative appeal prior to any punitive action. Cal Govt. Code § 3304(b). As these procedural safeguards comport with due process requirements mandated by *Loudermill*, if the actions taken against McCoy comply with the required administrative procedures, McCoy received adequate process.

McCoy received more process than the administrative procedures required and more than adequate process to satisfy the due process clause. First, the complaint was assigned to the OCC which is required to promptly, fairly and impartially investigate the complaint. McCoy does not deny that he was granted an investigation mandated by administrative procedure, he simply alleges that the investigation was inadequate because of poor training and bias. Had this been the only procedural safeguard, inadequate investigation might have been tantamount to a denial of due process. However, other administrative procedural safeguards were provided. The OCC report was approved by impartial and experienced directors. The MCD conducted an independent review even though this was not required by statute. Jordan reviewed the record before bringing charges. McCoy was given notice of the charges and discovery of the information, tapes and documents, garnered in the investigation. Even the investigator's notes, which had initially been omitted from discovery, were supplied six months prior to the conclusion of the McCoy I hearing. Most importantly, the Police Commission conducted an independent and impartial formal hearing on the charges before any deprivation took place. At the hearing, McCoy, who was represented by counsel, confronted and cross-examined witnesses and was given an opportunity to present a defense. Finally, as a result of this hearing, the charges were dismissed, correcting any infirmities that may have existed in the previous procedures preceding the hearing, including the failure to produce the document which allegedly contained exculpatory information.

The pre-deprivation process afforded McCoy in McCoy II also satisfied due process, even though the General Order on which it was based was later ruled unconstitutional. The second complaint was also investigated by the OCC and sent to Jordan, who reviewed the record before filing charges. McCoy was given notice of the charges and all documentation relating thereto. In addition, the formal pre-deprivation hearing in front of the Police Commission, where he was once again represented by counsel, gave him the opportunity to confront witnesses and to present a defense.

The state corrective action which followed McCoy's unconstitutional suspension also provided McCoy with additional process to satisfy constitutional due process requirements. While the Police Commission hearing did not reverse the suspension, McCoy was afforded post-deprivation safeguards that included Superior and Appellate court review. A post-deprivation judicial hearing provided by state law can cure defects in the pre-termination hearing. A prima facie § 1983 claim that an employee was deprived of his liberty or property right without due process of law cannot be established where the employee received full grievance hearings and has prevailed with full reinstatement and back pay. *Gearhart v. Thorne*, 768 F.2d 1072, 1073-74 (9th Cir. 1985). McCoy's argument that *Gearhart* should be distinguished because the reinstatement occurred in an administrative, rather than a judicial appeal, is rejected under the rationale of *Sewell v. Jefferson County Fiscal Court*, 863 F.2d 461 (6th Cir. 1988) (holding that plaintiff is barred from recovering under § 1983 for deprivation of property without due

process by her failure to demonstrate that the state judicial process was inadequate to rectify any administrative error); *see also Bussinger v. City of New Smyrna Beach*, 50 F.3d 922 (11th Cir. 1995). The California Court of Appeals dismissed the charges against McCoy, expunged any documentation relating to this proceeding from his employee file, restored his benefits and back pay, and paid his attorney's fees. The state appeals process rectified the administrative error in failing to recognize that the order under which the charge was brought was unconstitutionally vague, thus McCoy cannot prove a prima facie § 1983 claim that he was deprived of property or liberty without due process.

McCoy, who initially received a two day suspension, was given far greater process than *Loudermill* mandates for the termination of public employment. McCoy received all the safeguards provided for by California statute, notice of the charges, access to almost one hundred percent of the voluminous evidence accumulated against him at a meaningful time, a formal administrative hearing where he was able to present a defense, and judicial review. In McCoy I this process enabled him to avoid any deprivations of his interests. In McCoy II, the process ultimately enabled him to correct any constitutional errors, as opposed to procedural defects, that existed prior to the deprivation and restored his property and liberty interests to him.

Even if this court accepts that McCoy had vested property and liberty interests in his employment and thus, was entitled to the protections of the due process clause, (1) he was not deprived of these interests; (2) it is not the constitutionality of the regulation on which his

suspension was based that enables him to claim a Fourteenth Amendment due process violation, but rather the adequacy of the process afforded him in challenging the disciplinary actions; and (3) McCoy was afforded ample process through departmental procedures, before the Chief of Police, before the Police Commission, and in state court. McCoy's only complaint is that he was ultimately found innocent of charges that were brought against him, which he argues, proves those charges were false. If anything, this proves that McCoy was granted adequate process, since he was able to expose the falsehoods and successfully refute the charges against him. The police may discipline officers who violate rules, even if the discipline implicates property or liberty rights, so long as adequate process is provided prior to the deprivation. The truth or falsity of the charges determines whether the decision was correct, "but it neither enhances nor diminishes [the] claim that [a] constitutionally protected interest . . . has been impaired." *Bishop v. Wood*, 426 U.S. 341, 349 (1976). The *Bishop* Court acknowledged that "numerous individual mistakes are inevitable," but concluded that "the federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies." *Id.* at 349-50.

Consequently, as McCoy was not deprived of a constitutionally protected right nor was he deprived of that right without due process of law, the court need not address the third criteria, whether defendants are responsible for the deprivation. McCoy cannot satisfy the threshold criteria of a §1983 claim and thus this cause of action must be dismissed.

V. CONCLUSION

In accordance with the foregoing, it is hereby ordered that defendants' motion for summary judgment is GRANTED.

IT IS SO ORDERED.

Dated: November 7, 1995

/s/ Samuel Conti
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

FRANK McCOY Plaintiff, vs. THE CITY AND COUNTY OF SAN FRANCISCO, et al., Defendants.	No. C 91-2856 SC ORDER RE: PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT (Filed Nov. 1, 1994)

I. INTRODUCTION

This case involves plaintiff Frank McCoy's allegations of deprivation of due process against a vast array of defendants, including the City and County of San Francisco, then-police chief Frank Jordan, and attorneys and investigators who handled the investigations and hearings regarding the competency of a murder investigation undertaken by McCoy, an inspector with the San Francisco Police Department ("SFPD"). This case is presently before the court on plaintiff McCoy's motion for partial summary judgment.

II. LEGAL STANDARD

Summary judgment is proper only when there is no genuine issue of material fact and, when viewing the evidence in the light most favorable to the non-moving

party, the movant is clearly entitled to prevail as a matter of law. Fed. R. Civ. P. 56(c); *Jung v. FMC Corp.*, 755 F.2d 708, 710 (9th Cir. 1985). Once a summary judgment motion is made and properly supported, the adverse party may not rest on the mere allegations of his pleadings, but must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Celotex Corp. v. Myrtle Nell Catrett*, 477 U.S. 317 (1986). In addition, to withstand a motion for summary judgment, the non-moving party must show that there are "genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). If the factual context makes the non-moving party's claim implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). No longer can it be argued that any disagreement about a material issue of fact precludes the use of summary judgment. *California Architectural Building Products, Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987).

III. FACTS

On November 28, 1987, the San Francisco Police Department received a report of a stabbing. George Smoot died as a result of that stabbing, and McCoy was one of two officers assigned to the investigation. As a result of McCoy's investigation, a juvenile suspect was charged with manslaughter. During the course of the

investigation, a number of articles were published voicing concerns about the adequacy and competency of that investigation. As a result of such questions being raised in the community, Chief Jordan asked McCoy to respond to certain handwritten questions regarding the investigation, which at that time was ongoing.[1]

Between November 28, 1987, and August 29, 1990, two complaints were filed with the Office of Citizen Complaints ("OCC"), against McCoy, by Bill Paul, a journalist who had been publicly critical of the investigation.

The first complaint, "McCoy I," alleged "neglect of duty in investigating" against McCoy and others conducting the investigation in the Smoot case. The investigation of this complaint was assigned to defendant OCC investigator Shockey, who issued a report sustaining the neglect of duty charges. The report was approved by defendants Michael Langer (OCC Director) and Daniel Silva (Shockey's supervisor), allegedly with a willful and malicious intent to injure McCoy. Chief Jordan ordered SFPD Management Control to conduct its own investigation which resulted in a recommendation that no charges be sustained. Nevertheless, based on the OCC report, Chief Jordan charged McCoy before the Police Commission. Evidentiary hearings were convened beginning March 15, 1989, and lasted through the year. The charges were ultimately dismissed by the Police Commission.

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[1] McCoy initially refused to answer these questions, claiming it would be illegal to answer them because they concerned a juvenile proceeding. He claims that this refusal, in part, prompted the investigations of his actions by the Office of Citizen Complaints (described *infra*).

McCoy alleges violations of due process resulting from, *inter alia*, discovery disputes during the course of these proceedings.

A second OCC complaint was filed by Paul against McCoy on May 18, 1988 ("McCoy II"), alleging that McCoy had improperly called Paul on the telephone to question him about statements Paul had made. On October 14, 1988, OCC sustained the McCoy II complaint and Chief Jordan ordered that McCoy serve a two day suspension for the McCoy II violation. McCoy subsequently requested that Jordan's order of suspension be reviewed by the full Police Commission.

The Police Commission sustained Chief Jordan's action in McCoy II on August 29, 1990, finding that McCoy's phone call to Paul had violated an internal rule of the police department. McCoy served his suspension on November 28 and 29, 1990.

McCoy then petitioned the Superior Court for a writ of administrative mandamus and a request for declaratory relief. McCoy named as defendants in the state court action the Police Commission, Chief of Police Willis Casey, former Chief of Police Frank Jordan, and the City and County of San Francisco.[2] McCoy requested that the Commission be ordered to set aside his disciplinary proceedings, to restore benefits and back pay, and to remove documentation in his file relating to the proceeding. He also requested that the rule which he was suspended for violating be declared unconstitutional on its face and as

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[2] Individual defendants were named only in their official capacity.

applied to McCoy. The trial court denied his motion, but McCoy appealed and the California Court of Appeal, on October 18, 1993, reversed the trial court, granting all of McCoy's requested relief, except they found the rule unconstitutional only as applied to McCoy, not on its face. The present action was brought in federal court on September 3, 1991. McCoy has named as defendants in this action the City and County of San Francisco; the Police Commission; the Office of Citizen Complaints; former Chief of Police Frank Jordan, who brought charges against McCoy on both McCoy I and McCoy II; OCC Investigator Larry Shockey, the investigator assigned to investigate McCoy I; Daniel Silva, Shockey's supervisor who reviewed and approved Shockey's report recommending disciplinary action against McCoy in McCoy I; OCC Director, Michael Langer, who also reviewed and approved Shockey's report; Michael Gash, an attorney employed by the SFPD who presented the charges against McCoy in McCoy I to the Police Commission; Deputy City Attorney Mariam Morley who was assigned to provide advice to the OCC and the Police Commission during the McCoy I discovery disputes; and Deputy City Attorney Art Hartinger who was assigned to litigate the discovery disputes when McCoy decided to pursue his discovery requests through federal and state court rather than through the Police Commission. McCoy alleges various violations of his due process rights under 42 U.S.C. § 1983. Specifically, McCoy alleges (1) that defendants Langer, Silva, Shockey, and the City conducted an "unconstitutionally inadequate investigation"; (2) that defendants Jordan and the City pursued "unconstitutional disciplinary action"; (3) that defendants Gash,

Morley, and Hartinger violated McCoy's due process rights during discovery disputes in McCoy I; and (4) that all defendants conspired for the purposes of bringing meritless disciplinary charges against McCoy. In this motion, McCoy seeks summary judgment to establish the following facts:

> 1) That the disciplinary regulation which McCoy was prosecuted for violating is unconstitutionally vague as applied to McCoy's conduct.
>
> 2) That all acts alleged in the Second Amended Complaint that were actually performed by defendants were performed by them under color of state law and the authority of their respective offices.

IV. ANALYSIS

A. Whether defendants prosecuted McCoy under a rule which failed to give constitutionally adequate notice.

Plaintiff requests in its moving papers that this court grant summary judgment that:

> Defendants violated McCoy's right to due process of law by investigating, prosecuting, and disciplining him pursuant to General Order D-1, Rule A-9, which failed to give constitutionally adequate notice that his conduct was proscribed.

In response to several of defendants' arguments, plaintiff significantly narrowed his request. McCoy explained in his reply papers that he only requests issue preclusion that "the disciplinary regulation was unconstitutionally

vague as applied to plaintiff's conduct." (Plaintiff's Reply, p. 2).

1. Issue Preclusion

The doctrine of issue preclusion, or collateral estoppel, bars relitigation of issues that were actually adjudicated and essential to the judgment in earlier litigation between the same parties. *Garrett v. City and County of San Francisco*, 818 F.2d 1515, 1518 (9th Cir. 1987). Federal courts apply the collateral estoppel rules of the state from which the judgment arose to determine the effect of a state court judgment. *Garrett*, 818 F.2d at 1518. In California, collateral estoppel applies when:

> (1) the issue necessarily decided at a previous proceeding is identical to the one which is sought to be relitigated; (2) the previous proceeding resulted in a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the prior proceeding.

Knickerbocker v City of Stockton, 199 Cal. App. 3d 235, 244 (1988) (citations omitted).

Defendants do not dispute that the first two requirements are met in this instance and the court agrees. (Defendants' Memorandum, p. 13). The California Court of Appeal determined that:

> Rule A-9 failed to furnish [McCoy] with objective, ascertainable standards to guide the delicate matter of his seemingly necessary contact with a citizen complainant. . . . Accordingly, we are unable to find appellant's conduct so indicative of "unfitness to perform the functions of a

> police officer" as to be clearly proscribed by the very general language of Rule A-9. . . . On the contrary, we are persuaded that, as applied to [McCoy's] conduct, Rule A-9 failed to provide constitutionally adequate notice, and, therefore, cannot be relied upon by the Department to justify the discipline imposed upon him.

McCoy v. Police Commission, Unpublished opinion, Cal. Ct. of App. No. A057858, p. 14 (Oct. 18, 1993). It seems clear that the court determined "the disciplinary regulation was unconstitutionally vague as applied to plaintiff's conduct," and that this determination was necessarily decided. It is undisputed that the judgment has become final.

Defendants contend that the third requirement has not been met as to the individual defendants, because only one of the seven individual defendants in this action (former Chief of Police Jordan) was a party in the state court action, and that individual was only named in his official capacity.

The California Court of Appeal discussed the recently expanded notions of privity in *Aronow v. LaCroix*, 219 Cal. App. 3d 1039, 1048-49 (1990), *cert. denied*, 498 U.S. 1105 (1991):

> Privity is not susceptible of a neat definition, and determination of whether it exists is not a cut-and-dried exercise. . . . In the final analysis, the privity question, under current case law, simply depends on a determination of whether, in light of competing policy considerations, it is fair to saddle [the plaintiff] with the result obtained in a lawsuit in which she did not personally participate throughout . . . The question

> is whether [the plaintiff] is sufficiently close to [the previous litigation] to afford application of the principle of preclusion.

Notwithstanding expanded notions of privity, collateral estoppel may be applied only if due process requirements are satisfied. *Clemmer v. Hartford*, 22 Cal. 3d 865, 875 (1978). Due process requires that "the party to be estopped must have had an identity or community of interest with, and adequate representation by, the losing party in the first action as well as that the circumstances must have been such that the party to be estopped must have reasonably expected to be bound by the prior adjudication." *Clemmer*, 22 Cal. 3d at 875. In order for the judgment in the mandate proceeding to have preclusive effect, then, the interests of the individual defendants in this action must have been adequately represented in the mandate proceeding. McCoy named as defendants in the state court action the Police Commission, Chief of Police Willis Casey, former Chief of Police Frank Jordan, and the City and County of San Francisco. The individual defendants in this action have offered no evidence, nor put forth any arguments, showing how their interests diverged with those of the government defendants in the prior litigation. Nor can the court discern any way in which the interests of the individual defendants in this action would be different from the interests of the defendants in the mandate proceeding. The defendants in the first action were represented by the City Attorney, who sought to prove that the suspension of McCoy under the department rule was constitutional, and that the rule was constitutional on its face and as applied to McCoy. The individual defendants would have sought to prove the

same issues in the first action and would have had the same interests in litigating these issues. Indeed, the court believes that since the earlier proceeding involved only the constitutionality of a police department rule, the individual defendants would have had significantly less interest in litigating these issues (because they would have less at stake) than the police department and other government defendants in the prior action.[3]

Further, because the individual defendants in this action have chosen the City Attorney to represent them, one would assume that they believed their interests were adequately represented by the City Attorney in the first action. In *Brown v. Rahman*, 231 Cal. App. 3d 1458, 1463 (1991), the court found significant that the attorney representing the parties against whom collateral estoppel was being asserted was the same attorney who represented the (different) defendants in the first action. The court stated, "[I]ndeed, this fact, without more, would tend to supply the identity of interest required to establish privity." *Id.* at 1463.

Finally, the policy considerations which underlie the doctrine of preclusion – the promotion of judicial economy by minimizing repetitive litigation, the prevention of inconsistent judgments which undermine the integrity of

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[3] The court realizes that the individual defendants do have an interest in showing that their participation in applying the unconstitutional rule to McCoy did not violate McCoy's due process rights and in putting forth other defenses to McCoy's claims. The court's holding that the individual defendants are collaterally estopped from relitigating the constitutionality of the rule as applied to McCoy in no way forecloses the individual defendants from raising these defenses to McCoy's claims.

the judicial system, and the protection of innocent defendants against the vexation of repeatedly defending against the same claim brought by successive plaintiffs[4] – all support applying collateral estoppel in this case.

In sum, the court believes that if the government was unable to prove the constitutionality of its own rule as applied to McCoy, little would be gained by allowing the individual defendants represented by the same attorney who represented the government in the first action to retry the same issue and risk inconsistent judgments. The court believes the individual defendants' interests are "sufficiently close" to the government defendants in the first action, that it is fair, in light of competing policy considerations, to "saddle the individual defendants with the result obtained in a lawsuit in which they did not personally participate." *Aronow*, 219 Cal. App. 3d at 1049.

The court finds that McCoy has satisfied the three-prong test to establish issue preclusion vis-a-vis all defendants in this action. Thus, all defendants, in both their official and individual capacity, are precluded from relitigating the constitutionality of the disciplinary regulation as applied to McCoy.[5]

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[4] *Aronow*, 219 Cal. App. 3d at 1052; *People v. Sims*, 32 Cal. 3d 468, 488-89 (1982).

[5] The court acknowledges that other circuits have held that government officials sued in their individual capacity are not in privity with the government. *See Gray v. Lacke*, 885 F.2d 399, 405-06 (7th Cir. 1989), *cert. denied*, 494 U.S. 1029 (1990); *Headley v. Bacon*, 828 F.2d 1272, 1279 (8th Cir. 1987). However, the court has found no Ninth Circuit opinion supporting this rule and believes that under the specific facts in this case – where the issue is the constitutionality of a government rule – that the

2. Other Defenses Raised by Defendants

Defendants raise a variety of defenses as to why summary judgment on this issue should nevertheless be denied. The court will address each in turn.

Defendants contend that summary judgment should be denied because plaintiff's complaint contains no allegations regarding due process violations based on *inadequate notice.*

The court disagrees. Plaintiff's complaint contains various allegations that the investigation was unconstitutional because of due process violations. For example, McCoy alleges that all defendants conspired to bring "meritless" charges against him, "even though said charges were not valid," and that this conspiracy violated McCoy's due process rights. (First Amended Complaint, ¶ 89-92). "Meritless" and "invalid charges" could certainly refer to charges based on a rule which failed to give constitutionally adequate notice. Plaintiff is not required to plead in detail every specific fact which constitutes his due process violations.

The Federal Rules of Civil Procedure provide for "notice pleading." The Rules do not require a claimant "to set out in detail the facts upon which he bases his

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Ninth Circuit would find issue preclusion against the individual defendants in this case. The Ninth Circuit's emphasis on balancing the fairness in collaterally estopping a party against the competing policy considerations would, this court believes, lead the Ninth Circuit to determine that the interests of the individual defendants are sufficiently close to the defendants in the prior litigation to justify collateral estoppel in this case.

claim. To the contrary, all the rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957) (citing Fed. R. Civ. Pro. 8(a)(2)). The rules assume that the liberal opportunities for discovery and other pretrial procedures will be used to disclose more precisely the basis of the claims. *Id.* Indeed, defendants were given ample notice of this specific claim in Plaintiff's Amended Opposition to Defendant's Motion to Dismiss. (Filed May 31, 1994, p.8 n.3). Thus, defendants' challenge to partial summary judgment on this basis must be denied.

Defendant also argues that the doctrine of *res judicata* bars McCoy from litigating a due process claim based on being disciplined under an unconstitutional rule. As this court explained at length in its June 16, 1994 order, *res judicata* does not prevent a plaintiff who has brought a mandamus action to recover wrongfully denied employment, from bringing a subsequent action for damages based on that wrongful denial. *See* Order Re: Defendants' Motion To Dismiss, June 16, 1994, p. 5-9; *Craig v. County of Los Angeles*, 221 Cal. App. 3d 1294, 1301-03 (1990); *Mata v. City of Los Angeles*, 20 Cal. App. 4th 141, 149 (1993).[6] Thus, McCoy is entitled to prove in this action that he should be awarded damages for the defendants' disciplining him

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[6] Although defendants argued both in this motion and in their earlier Motion to Dismiss that McCoy litigated the damages at issue in this action in the mandamus proceeding, they have not offered sufficient evidence to support this assertion.

under an unconstitutional rule.[7] Accordingly, defendants' challenge to partial summary judgment on this basis must also be denied.

Finally, defendants raise several defenses to plaintiff's claim that his due process rights were violated because he was disciplined under an unconstitutionally vague rule. The court makes no determination that McCoy's due process rights were violated; defendants will not be precluded from raising these defenses at trial. Thus, it is unnecessary to address defendants' substantive defenses to McCoy's allegations of due process violations.

B. Whether Defendants Were Acting Under Color of State Law

McCoy also seeks summary judgment that:

> All acts alleged in the Second Amended Complaint that were actually performed by defendants were performed by them under color of

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[7] The doctrine of *res judicata* does not affect the court's ability to find collateral estoppel. Courts have regularly recognized that even though a claim may not be precluded by a prior action under *res judicata*, a party may be precluded from relitigating issues decided in the prior proceeding under the doctrine of collateral estoppel. *See Mata v. City of Los Angeles*, 20 Cal. App. 4th 141, 149 (1993) (pursuant to the doctrine of issue preclusion, a judgment in a mandamus proceeding may "operate as an estoppel or conclusive adjudication as to such issues in the second action as were actually litigated and determined in the first action"); *Trujillo v. County of Santa Clara*, 775 F.2d 1359, 1369 (9th Cir. 1985).

state law and the authority of their respective offices.

Defendants readily admit that the actions they took were in their capacities as city employees and therefore they were acting under color of state law. Defendants vehemently dispute that they took the actions McCoy attributes to them. McCoy, however, is not asking the court to determine whether defendants carried out any of the alleged acts. McCoy requests only that it be established that "to the extent defendants did any of the acts alleged in the complaint, they did so under color of state law and under authority of their respective offices." (Memorandum in Support of Motion for Partial Summary Judgment, p.12). Defendants do not dispute this assertion. Accordingly, the court finds that it may be established for trial that to the extent defendants committed any of the acts alleged in the complaint, they did so under color of state law and under authority of their respective offices.

V. CONCLUSION

In accordance with the above reasoning, the court orders that plaintiff's motion for partial summary judgment is GRANTED. Defendants are collaterally estopped from relitigating the issue of the constitutionality of the Police Department rule as applied to McCoy. The court also GRANTS summary judgment that to the extent defendants committed any of the acts alleged in the complaint, they did so under color of state law and under authority of their respective offices. The court emphasizes, however, that it is not granting summary judgment

on any of plaintiff's claims; defendants are free to raise any defenses proving that their discipline of McCoy did not violate McCoy's rights and to show that they did not perform the acts alleged in the complaint.

IT IS SO ORDERED.

Dated: November 18, 1994.

/s/ Samuel Conti
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

FRANK MCCOY, Plaintiff, v. CITY AND COUNTY OF SAN FRANCISCO, et al., Defendants.	No. C 91-2856 SC ORDER RE: DEFENDANT'S MOTION TO DISMISS (Filed June 16, 1994)

I. INTRODUCTION

This case involves plaintiff Frank McCoy's ("McCoy"), allegations of deprivation of due process against a vast array of defendants, including the City and County of San Francisco, then-police chief Frank Jordan, and attorneys and investigators who handled the investigations and hearings regarding the competency of a murder investigation undertaken by McCoy, an inspector with the San Francisco Police Department. The case is presently before the court on defendants' motion to dismiss under Fed. R. Civ. P. 12(b) based on several theories. Defendants claim that the entire lawsuit is barred by res judicata; that qualified immunity and absolute immunity bar the lawsuit as to the individual defendants; and that defendants Gash and Hartinger were never properly served.

II. Legal Standard

The Ninth Circuit standard for a motion to dismiss is as follows:

> . . . a complaint should not be dismissed under Fed. R. Civ. P. 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).
>
> A complaint may be dismissed as a matter of law for two reasons: (1) lack of a cognizable legal theory or (2) insufficient facts under a cognizable theory. 2A J. Moore, *Moore's Federal Practice* 12.08 at 2271 (2d ed. 1982).

Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 533-34 (9th Cir. 1984). In reviewing a motion to dismiss, "all the allegations of material fact are taken as true and construed in the light most favorable to the non-moving party." Moreover, "to dismiss, it must appear to a certainty that the plaintiff would not be entitled to relief under any set of facts that could be proved." *Wool v. Tandem Computers Inc.*, 818 F.2d 1433, 1439 (9th Cir. 1987). With this standard in mind, the relevant facts as alleged by plaintiff are set forth below.

III. Background

On November 28, 1987, the San Francisco Police Department received a report of a stabbing. George Smoot died as a result of that stabbing, and McCoy was one of two officers assigned to the investigation. As a result of McCoy's investigation, a juvenile suspect was

charged with manslaughter. During the course of the investigation, a number of articles were published voicing concerns about the adequacy and competency of that investigation. Such community concern prompted Chief Jordan to request that McCoy respond to certain handwritten questions regarding the investigation, which at that time was ongoing.[1]

Between November 28, 1987, and August 29, 1990, two complaints were filed against McCoy with the Office of Citizen Complaints ("OCC"), by Bill Paul, a journalist who had been publicly critical of the investigation.

The first complaint, McCoy I, alleged "neglect of duty in investigating" against McCoy and others conducting the investigation of the Smoot case. The investigation of this complaint was assigned to defendant OCC investigator Shockey, who issued a report sustaining the neglect of duty charges. The charges were ultimately dismissed by the Police Commission. McCoy alleges in this action violations of due process resulting from, *inter alia*, discovery disputes during the course of these proceedings.

A second OCC complaint was filed by Paul against McCoy on May 18, 1988 ("McCoy II"), alleging that McCoy had improperly called Paul on the telephone to question him about statements Paul had made. After the complaint went through the various levels of appeal

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[1] McCoy initially refused to answer these questions, claiming it would be illegal to answer them because they concerned a juvenile proceeding. He claims that this refusal, in part, prompted the investigations of his actions by the Office of Citizen Complaints (described below).

within the Police agency, the Police Commission determined McCoy had violated an internal rule by contacting Paul, and Police Chief Jordan suspended him for two days. McCoy served the two-day suspension on November 28 and 29, 1990.

McCoy then petitioned the Superior Court for a writ of administrative mandamus and a request for declaratory relief. McCoy requested that the Commission be ordered to set aside his disciplinary proceedings, to restore benefits and back pay, and to remove documentation in his file relating to the proceeding. He also requested that the rule which he was suspended for violating be declared unconstitutional on its face and as applied to McCoy. The trial court denied his motion, but McCoy appealed and the appellate court, on October 18, 1993, reversed the trial court, granting all of McCoy's requested relief, except they found the rule unconstitutional only as applied to McCoy, not on its face.

The present action was brought in federal court on September 3, 1991. McCoy alleges various violations of his due process rights under 42 U.S.C. Section 1983, stemming from alleged misconduct by the individuals involved with the McCoy I & II investigations. He claims, *inter alia*, that both these investigations of his actions were retaliatory based on his initial refusal to respond to questions about the juvenile investigation; that the defendants conspired to improperly prosecute McCoy and concealed favorable evidence from him and manufactured false evidence against him; and that the city and commission failed to adequately train its investigators. Such misconduct, it is alleged, resulted in deprivations of due process and loss of promotional opportunity.

III. DISCUSSION

a. The Res Judicata Effect of the Mandamus Proceeding

Under the doctrine of res judicata, once a plaintiff prevails on a claim, the cause of action is merged into the judgment and the plaintiff's only remaining right is on that judgment. This merger prohibits a plaintiff from splitting a single cause of action into successive suits. *Craig v. County of Los Angeles*, 221 Cal. App. 3d 1294 (1990).

California law governs the preclusive effect of a state court judgment in a federal court. *Migra v. Warren City School Dist. Bd. of Ed.*, 465 U.S. 75, 81 (1984) ("It is now well-settled that a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered").

Several California courts have addressed the res judicata effect of a mandamus proceeding brought to force an employer to hire or rehire an employee. In those cases it is clear, that where the only claims litigated in the mandamus proceedings involved the employee's right to be hired or rehired, that such action did not bar subsequent civil rights actions based on the same operative facts.

To determine the scope of causes of action, California courts apply the "primary rights" theory. "Under this theory, the underlying right sought to be enforced determines the cause of action. In determining the primary right, the significant factor is the harm suffered." *Craig*, 221 Cal. App. 3d at 1301.

Craig applied the "primary rights" analysis to facts similar to this case. In that case the plaintiff sought to be employed as a harbor patrol officer and brought a mandamus action to force the county to employ him. Plaintiff prevailed, and he subsequently filed suit in a state court to recover damages, alleging unfair employment practices, intentional infliction of emotional distress, and fraud. The county claimed that the second action was barred by res judicata. The court disagreed, finding that the primary right in the mandate action involved the right to be employed as a harbor patrol officer and that "the later action to recover damages because of the denial of that right involves a different primary right." *Craig*, 221 Cal. App. 3d at 1301-02. Applying the harm analysis, the court found that the harm involved in the mandate proceeding was the "denial of the harbor patrol position" and that the harm in the second proceeding included "the emotional distress which resulted from the wrongful conduct." 221 Cal. App. 3d at 1303. *See also Daugherty v. Board of Trustees*, 111 Cal. App. 2d 519 (1952) (where prior mandamus proceeding was to compel reinstatement of plaintiff, subsequent proceeding to force employer to pay her back-pay was a separate and distinct cause of action); *Agarwal v. Johnson*, 25 Cal. 3d 932 (1979).

The same analysis applies to this case. The primary right in the writ proceeding was McCoy's right not to be suspended. The primary right in the present case involves his right to recover damages based on the suspension and the misconduct of the defendants in conducting the investigation which led to the suspension.

The harm in the writ proceeding was the suspension, and the harm in this subsequent proceeding includes the

violation of his due process rights which occurred in the investigation of McCoy's conduct.

Mata v. City of Los Angeles, 20 Cal. App. 4th 141 (1993), affirms this analysis. In that case, a police officer petitioned for a writ of mandate directing the city and its police chief to reinstate him, and he also sought damages under 14 U.S.C. section 1983. The Court of Appeal held that an administrative mandamus judgment vacating illegal termination does not bar the employee from bringing a cause of action under section 1983. Although in that case the employee joined the request for administrative mandamus with his 1983 claim, the court stated that the employee had several procedural options, one of which was "to *follow* his victory in the administrative proceeding with an action for violation of 42 U.S.C. section 1983 filed in either state court or federal court." *Mata*, 20 Cal. App. 4th at 147 (emphasis added). The court emphasized that the section 1983 action involves a different cause of action. "In fact, the mandamus proceeding is technically not regarded as a cause of action at all. It is, instead, described as a special proceeding. Therefore, appellant's section 1983 action is not barred by the doctrine of claim preclusion." 20 Cal. App. 4th at 149.[2]

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[2] Defendants contend that if a plaintiff's mandamus action is appealed to superior court where the 1983 action *could* be brought, that that *opportunity* is sufficient to bar a 1983 claim. The court reads *Mata* and *Craig* as singling out mandamus proceedings as distinct actions which do not bar subsequent actions for damages as long as the issues brought in the subsequent actions were not litigated in the mandamus action. Whether or not the mandamus action was appealed to superior court is irrelevant.

Defendants cite *Clark v. Yosemite Community College District*, 785 F.2d 781 (9th Cir. 1986) in support of their position that the 1983 claim is barred by res judicata. *Clark* is inapplicable to this case, because in *Clark*, the court found that the employee had actually raised all the issues raised in the second suit in the prior mandamus proceeding. The court held the second suit barred because the issues had already been litigated. *Clark*, 785 F.2d at 786. By contrast, based on the record of the mandamus proceeding before the court,[3] it appears that McCoy raised only the issues of his right not to be suspended and the unconstitutionality of the rule which he was suspended for violating (which was a decision necessary to finding the suspension unwarranted). The claims at issue in this case – McCoy's due process violations resulting from the investigations which led to the suspension – were not raised at the prior proceeding. Thus, the court finds that this action is not barred by res judicata.

b. Absolute Immunity

Defendants argue that all of the individual defendants enjoy absolute immunity "because all of the alleged

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[3] The court has taken judicial notice of the following: McCoy's Petition for Writ of Administrative Mandamus; California Appellate Court Decision from *McCoy v. Police Commission of San Francisco, et al.*; Order re: Petitioners Motion for Attorneys' Fees as Costs on Appeal in *McCoy v. Police Commission of San Francisco, et al.*; Judgment Granting Petition for Peremptory Writ of Administrative Mandamus; and Order Awarding Reasonable Attorney's Fees to Petitioner for Work Done on Appeal and also for Administrative and Superior Court Proceedings.

unconstitutional conduct occurred during proceedings that were judicial in nature." While it is true that the participants in federal and state court judicial proceedings do enjoy absolute immunity for their adjudicatory acts, it is not true that this immunity has been extended to all types of governmental adjudicatory proceedings, such as the Office of Citizen Complaint or Police Commission proceedings at issue in this case.

The Supreme Court has observed, "[f]ew doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction." *Pierson v. Ray*, 386 U.S. 547, 553-54, 87 S.Ct. 1213, 1217 (1967). The Court in *Pierson* stressed that such immunity was necessary to protect the integrity of the judicial process. The Court has extended the absolute immunity to certain others who perform functions closely associated with the judicial process. Full immunity has been given to state and federal prosecutors, *Imbler v. Pachtman*, 424 U.S. 409, 424-26, 96 S.Ct. 984, 992-993 (1976), to witnesses, *Briscoe v. LaHue*, 460 U.S. 325, 355, 103 S.Ct. 1108, 1115 (1983), and to the federal hearing examiner and administrative law judge, *Butz v. Economou*, 438 U.S. 478, 509-10, 98 S.Ct. 2894, 2914 (1978). The Supreme Court has, however, been "quite sparing in its recognition of claims to absolute official immunity." *Forrester v. White*, 484 U.S. 219, 108 S.Ct. 538, 542 (1988).

In *Butz*, the Court mentioned the following factors, among others, as characteristic of the judicial process and to be considered before granting absolute as opposed to qualified immunity: (a) the need to assure that the individual can perform his duties without harassment or

intimidation and (b) the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct. *Butz* stressed the following safeguards as relevant to the inquiry:

> the insulation of the judge from political influence, the importance of precedence in resolving controversies, the adversary nature of the process, and the correctability of error on appeal.

Butz, 438 U.S. at 512.

Applying these principles to the facts of the present case, it seems that the Police Commission disciplinary proceedings do not require the stringent protection of absolute immunity.

The harassment and intimidation factor may be present as it is with any type of disciplinary proceeding, but not to the same extent as with criminal defendants in a trial setting. In most cases before the OCC and the Commission, officers are just disciplined, and thus would likely not bring a harassment suit if they desire to stay on good terms with their employer.

Further, the police disciplinary proceedings do not contain the same safeguards of a judicial trial. The participants in the police process at issue do not possess the freedom from political influence that judges do. The Police Commission is comprised of mayoral appointees. That Commission in turn appoints the chief of police and the director of the OCC. The director appoints the hearing officers and staff of that office. In addition, the police disciplinary process does not guarantee that the participants will be as objective as traditional judges. Since all

involved in the disciplinary process – including the officer being disciplined – work together in the same police agency, one would naturally expect biases to occur. Thus, the process does not guarantee the same objectivity and freedom from influence as in a classic judicial proceeding.

Precedence likely plays a minor role, if any, in the resolution of controversies in the police disciplinary process.

The extent of the adversary nature of the process is unclear from the memoranda supporting this motion, but from the facts of this case, the process seems to be much less formal than the procedures in state or federal court. In *Butz*, the Supreme Court found comforting the agency's adoption of the Administrative Procedure Act. *Butz*, 438 U.S. at 514, 98 S.Ct. at 2914-15. Clearly the police commission has not adopted this act, nor does it follow such formal rules ensuring the same fairness of process that the APA ensures for federal agency proceedings. Hearings in front of the OCC are by request only, and the police chief can ignore the disciplinary recommendation of the OCC and independently recommend his own discipline, subject to right of appeal to the full commission.

Finally, the proceedings do contain the last safeguard mentioned in *Butz*, as errors may be corrected through a right of appeal to the courts.

The court finds that, on balance, the adjudicatory proceedings for police discipline are not functionally equivalent to judicial proceedings, and thus the participants should not be granted absolute immunity.

The Supreme Court has declined to extend absolute immunity to other disciplinary committees, such as a federal prison's discipline committee (which hears cases against inmates charged with rule infractions). *Cleavinger v. Saxner*, 474 U.S. 193, 202, 106 S.Ct. 496, 501 (1985). Applying the *Butz* factors, the Supreme Court in *Cleavinger* concluded that the discipline committee's function was not "a classic adjudicatory one." The Court elaborated:

> The members of the committee, unlike a federal or state judge, are not independent . . . they are not professional hearing officers, as are administrative law judges . . . They are direct subordinates of the warden who reviews their decision.

Cleavinger, 474 U.S. at 203, 106 S.Ct. at 502 (1985). The Court also noted the pressure on the prison disciplinary committee to resolve a disciplinary dispute in favor of the institution. While there is likely less pressure to resolve a disciplinary proceeding in the police context in favor of one side, the rest of the considerations in *Cleavinger* – which prevent the proceeding from being a classic adjudicatory proceeding – are present in the police context.[4]

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[4] The Ninth Circuit has extended absolute immunity to government attorneys involved in civil litigation in state and federal court, *Fry v. Melaragno*, 939 F.2d 832, 837 (9th Cir. 1991), and to parole boards, *Sellars v. Procunier*, 641 F.2d 1295 (9th Cir.), *cert. denied*, 454 U.S. 1102 (1981); however, the former is a traditional adjudicatory proceeding and the latter, the court determined, is "a neutral and detached hearing body . . . serving essentially as an arm of the sentencing judge." 641 F.2d at 1302, n.15. Both of these proceedings are distinguishable under the *Butz* factors from the police proceeding.

The court finds that the function of the police disciplinary process is not a classic adjudicatory proceeding and thus is not entitled to absolute immunity.

c. Qualified Immunity

Defendants next argue that the individual defendants are entitled to qualified immunity "because they did not violate any clearly established right of the plaintiff." Qualified immunity serves to shield public officials from civil liability. "Under this form of immunity, government officials are not subject to damages liability for the performance of their discretionary functions when their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Buckley v. Fitzsimmons*, ___ U.S. ___, 113 S.Ct. 2606, 2613 (1993). The qualified immunity test necessitates three inquiries: (1) the identification of the specific right allegedly violated; (2) the determination of whether that right was so "clearly established" as to alert a reasonable officer to its constitutional parameters; and (3) the ultimate determination of whether a reasonable officer could have believed lawful the particular conduct at issue. *Romero v. Kitsap County*, 931 F.2d 624, 627 (9th Cir. 1991).

All of the individual defendants in this action are public officials and thus are entitled to qualified immunity unless the defendant can show that a clearly established right was violated and that a reasonable officer would have believed his conduct was unlawful.

In his brief opposing this motion, plaintiff claims that the clearly established rights violated were retaliatory

prosecution, substantive due process, and rights violated by "allegations of misconduct." His second amended complaint contains more specificity as to the misconduct, but the substance of the constitutional violations is somewhat conclusory. McCoy alleges four counts in his complaint: (1) unconstitutionally inadequate investigation (including failing to adequately select and train OCC investigators); (2) unconstitutional disciplinary action (retaliatory based on McCoy's resistance to the illegitimate request for information about the juvenile investigation), (3) due process violations (including the defendants' perjury about their discovery violations in the McCoy investigations); and (4) conspiracy (to improperly prosecute McCoy and conceal favorable evidence from him and manufacture false evidence against him).

Despite the somewhat conclusory link between the misconduct and the violations, at this stage in the lawsuit, it does seem that the claims above could establish constitutional substantive and procedural due process violations if the facts showed that the actions of the officers would have seemed unlawful to a reasonable officer. Since on a motion to dismiss, "all the allegations of material fact are taken as true and construed in the light most favorable to the non-moving party," *Wool v. Tandem Computers Inc.*, 818 F.2d 1433, 1439 (9th Cir. 1987), the court finds sufficient objective facts to avoid dismissal at this stage. Thus, this court believes that a motion for dismissal based on qualified immunity would be better evaluated after discovery at the summary judgment stage.

d. Improper Service of Defendants Gash and Hartinger

Defendants assert that two defendants, Hartinger and Gash, were not properly served.

Defendant Hartinger was timely served through the office of the Mayor of San Francisco, after three attempts to personally serve him. As actual notice is not denied, the court finds that reasonable diligence was exercised and that service was proper for defendant Hartinger. *Espindola v. Nunez,* 199 Cal. App. 3d 1389 (1988).

Defendant Gash was served by substitute service, slightly outside the 120 day limit for service. Attempts at service began over a week prior to the deadline, but Gash failed to return the investigator's calls requesting an appointment. Finally, after five attempts at personal service, the investigator left a copy of the summons at his house and at his office. As actual notice is not denied, the court finds that reasonable diligence was exercised. *Espindola,* 199 Cal. App. 3d 1389. The court finds that service three or four days over the limit where there is some evidence of evasion,[5] is sufficient cause under Fed. R. Civ. P. 4 for an extension of the time limit for service.

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[5] In addition to not calling back the investigator to schedule an appointment as promised, Mr. Gash seems to have been quite unreachable when the investigator was trying to serve him. The investigator was told by Gash's office the first time he went there that Gash had gone home sick; yet the investigator found no one at Gash's home. The second time the investigator went to Gash's office he was told Gash had taken the day off, and again no one was at Gash's house.

Thus, the court finds that service was proper for defendant Gash.

IV. CONCLUSION

In accordance with the foregoing, it is hereby ORDERED that: Defendants motion to dismiss is DENIED.

IT IS SO ORDERED.

Dated: June 14, 1994.

/s/ Samuel Conti
United States District Judge

APPENDIX G

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANK MCCOY, *Plaintiff-Appellant,* v. SAN FRANCISCO, CITY & COUNTY, a Municipal Corp., et al., *Defendant-Appellee.*	No. 92-16319 D.C. No. CV-91-02856-SC OPINION

Appeal from the United States District Court
for the Northern District of California
Samuel Conti, District Judge, Presiding

Argued and Submitted
December 17, 1993 – San Francisco, California

Filed January 7, 1994

Before: Otto R. Skopil, Jr., David R. Thompson, and Pamela Ann Rymer, Circuit Judges.

Opinion by Judge Skopil

SUMMARY

Civil Litigation/Statutes of Limitation/Individual Rights

The court of appeals reversed and remanded for further proceedings a district court judgment of dismissal. The court held that a police officer's civil rights claim

against his employer accrued at the time that a police commission issued a written statement of decision, rather than at an earlier hearing when the ruling was stated to him orally.

Appellant Frank McCoy, a police officer employed by appellee City and County of San Francisco, was ordered suspended for two days as a disciplinary measure. McCoy appealed to the City's police commission. On August 29, 1990, at the conclusion of hearings, the commission orally stated its ruling that the charge and penalty were sustained. Two weeks later, on September 13, the commission issued a written decision that summarized the evidence, recited the language of the order McCoy was alleged to have violated, and concluded that the suspension order was sustained by a preponderance of evidence.

McCoy filed a federal civil rights action on September 3, 1991. The district court dismissed on the ground that the applicable one-year statute of limitations had run. The court reasoned that the oral decision was final, notwithstanding the written confirmation which was issued two weeks later.

It is undisputed that the commission issues written decisions. The defendants did not consider the oral decision final as indicated by their submission of proposed findings of fact to the commission after the oral decision. McCoy's defenses were not rejected until the written decision. Finally, the written decision took the form of a final decision. The written decision clearly was the final decision that triggered the applicable statute of limitations.

COUNSEL

James A. Lassart & Gail Y. Norton, ROPERS, MAJESKI, KOHN, BENTLEY, WAGNER & KANE, San Francisco, California for the plaintiff-appellant.

Barron L. Weinstein, Chief of Complex Litigation; and Geoffrey Gordon-Creed, Deputy City Attorney, San Francisco for the defendant-appellee.

OPINION

SKOPIL, Circuit Judge:

Frank McCoy appeals the district court's dismissal of his civil rights action, contending that the court erred by holding that the action was time barred. We agree, and reverse and remand for further proceedings. We decline to affirm on the alternative grounds raised by appellees.

I.

McCoy, a San Francisco Police Homicide Inspector, brought this civil rights action against the city and county of San Francisco, the police chief, various officers within the police department, and attorneys representing the department and city. McCoy alleges that these defendants conspired to deny him his civil rights in conjunction with disciplinary action taken against him that culminated in a two-day suspension.

The underlying facts are undisputed. McCoy and other officers were investigated by the police department regarding a citizen's complaint filed as a result of the

officers' alleged conduct at the scene of a murder on November 28, 1987. McCoy complained that the investigative report was inaccurate and was expressly intended to damage his reputation.

A second investigation resulted in a recommendation that no charges be brought against McCoy. The Chief nevertheless charged McCoy with two violations of the department's general orders. The charges were reviewed by the Police Commission and hearings were conducted throughout 1989. At the conclusion of its meeting on January 3, 1990, the Commission voted unanimously to dismiss all charges against McCoy. The Commission's final written decision was released three weeks later on January 22, 1990.

During the department's investigation of McCoy, it came to light that on May 17, 1988 McCoy had telephoned the citizen who initiated the complaint. The citizen filed a second complaint based on the telephone call. As a result of that complaint, the Chief decided to suspend McCoy for two days.

The suspension was appealed to the Police Commission. Hearings were conducted on May 7, June 5, and August 29, 1990. At the conclusion of the August 29 hearing, the Commission ruled orally that:

> It is the unanimous decision of the Commission to sustain the Chief as to the charge involving the call to Complainant [citizen].
>
> That's the decision and as to penalty, needless to say, which was a two day suspension. Thank you.

Shortly thereafter defendants submitted proposed findings of fact to the Commission.

On September 13, 1990 a written decision was issued by the Police Commission which summarized the evidence presented against McCoy, recited the language of the general order found to have been violated, and concluded that the Chief's decision was sustained by a preponderance of the evidence. The decision also set the dates of the two-day suspension.

McCoy served his suspension on November 28-29, 1990. He thereafter petitioned the California Superior Court for a writ of administrative mandamus, challenging the Police Commission's decision to suspend him. Relief was denied. The First District Court of Appeals recently reversed, concluding that the rules in effect at the time were unconstitutionally vague and failed to give McCoy adequate notice that his conduct would subject him to discipline.

McCoy filed his federal civil rights action on September 3, 1991, alleging civil conspiracy and civil rights violations pursuant to 42 U.S.C. §§ 1983, 1986, 1988. Defendants responded with a motion to dismiss on the grounds that (1) the complaint failed to state a cause of action, (2) the claims were time barred, (3) defendants are immune, and (4) service on some defendants was improper. The motion was granted without prejudice on the statute of limitations ground only.

McCoy filed a second amended complaint, alleging additional facts to support the timeliness of the action. The district court again dismissed McCoy's complaint in its entirety on the statute of limitations ground alone, this

time with prejudice. The court reasoned that the Police Commission's oral decision on August 29, 1990 was final, "notwithstanding the written confirmation which was handed down two weeks later." The court also rejected McCoy's theory that defendants committed other later overt acts in furtherance of the conspiracy. The court expressly declined to reach or address any of the other grounds asserted for dismissal.

II.

California's one-year statute of limitations for personal injury actions applies to McCoy's civil rights claims. *See Taylor v. Regents of University of California*, 993 F.2d 710, 711 (9th Cir.1993) (citing *Wilson v. Garcia*, 471 U.S. 261, 275 (1985)). Although state law determines the length of the limitations period, "the determination of the point at which the limitations period begins to run is governed solely by federal law." *Hoesterey v. City of Cathedral City*, 945 F.2d 317, 318-19 (9th Cir.1991), *cert. denied*, 112 S.Ct. 1941 (1992). The touchstone for determining the commencement of the limitations period is notice. *Id.* at 319. Thus, "a cause of action generally accrues when a plaintiff knows or has reason to know of the injury which is the basis of his action." *Id.* (internal quotation omitted). The district court applied that standard and concluded that McCoy was put on notice by the Police Commission's oral decision on August 29, 1990. Our review is de novo. *Taylor*, 993 F.2d at 711.

There is no dispute that a statute of limitations period is triggered by the decision constituting the discriminatory act and not by the consequences of that act.

See Delaware State College v. Ricks, 449 U.S. 250, 257-58 (1980). For example, a cause of action for discriminatory discharge accrues at the time of the decision and is not prolonged by "mere continuity of employment." *Id.* at 257. The termination of employment is simply the "delayed, but inevitable, consequence of the denial of tenure." *Id.* at 257-58. The district court may have reasoned that the written decision here was merely the inevitable consequence of the oral decision. The court stated that McCoy was put on notice of the suspension by the oral ruling and "should have known that the decision would not change."

There are several factors that undermine the district court's reliance on the oral decision. First, it is apparently undisputed that the Police Commission issues written decisions. Indeed, such a written decision was issued in McCoy's first proceeding. Second, defendants apparently did not consider the oral decision to be final since they submitted proposed findings of fact to the Commission after the oral decision. Third, it was not until the written decision that McCoy's defenses were rejected. Finally, the written decision takes the form of a final decision. It recites facts, the text of the department's rules, and evaluates and weighs the evidence. The decision concludes that:

> [T]he Commission unanimously finds that the findings of the Chief supporting the two-day suspension imposed on Inspector Frank McCoy are sustained by a preponderance of evidence presented; therefore . . . the Commission sustains the two-day suspension imposed on Inspector Frank McCoy by the Chief of Police.

We conclude that the written decision rather than the oral decision triggered the statute of limitations. Although McCoy "knew" of the Commission's decision at the conclusion of the August 29 hearing, he also knew that the Commission would issue a more detailed written decision. That written decision supplied the rationale of the Commission, addressed the defenses raised by McCoy, and set the dates of the suspension. The written decision clearly was the "final decision" that triggered the applicable statute of limitations. *See Norco Const., Inc. v. King County,* 801 F.2d 1143, 1145-46 (9th Cir.1986) (statute of limitations does not commence on section 1983 action until plaintiff's cause of action accrues upon an agency's final decision).

Accordingly, we must reverse the district court's dismissal based on the statute of limitations. We do not need to address McCoy's alternative theories that later overt acts extended the limitations period, that the statute was tolled, or that defendants should be estopped from asserting the defense. We decline to affirm on any of the alternative grounds submitted to the district court in defendants' motion to dismiss. *See Portman v. County of Santa Clara,* 995 F.2d 898, 910 (9th Cir.1993) (appellate court is not obligated to affirm on alternative ground).

REVERSED and REMANDED.

APPENDIX H

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

FRANK McCOY Plaintiff, v. THE CITY AND COUNTY OF SAN FRANCISCO, et al., Defendants.	)	No. C 91-2856 SC ORDER RE DEFENDANT'S MOTION TO DISMISS (Filed June 26, 1992)

I. Introduction

This case involves Plaintiff Frank McCoy's ("McCoy"), allegations of deprivation of due process against a vast array of defendants, including the City and County of San Francisco, then-police chief Frank Jordan, and attorneys and investigators who handled the investigations and hearings regarding the competency of a murder investigation undertaken by McCoy, an Inspector with the San Francisco Police Department. This case is presently before the court on defendants' motion to dismiss McCoy's first amended complaint on a variety of grounds, including timeliness and immunity. McCoy's first complaint was dismissed on statute of limitations grounds.

II. Legal Standard

1. Legal Standard

The Ninth Circuit standard for a motion to dismiss is as follows:

> . . . a complaint should not be dismissed under Fed. R. Civ. P. 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).
>
> A complaint may be dismissed as a matter of law for two reasons: (1) lack of a cognizable legal theory or (2) insufficient facts under a cognizable theory. 2A J. Moore, *Moore's Federal Practice* ¶ 12.08 at 2271 (2d ed. 1982).

Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 533-34 (9th Cir. 1984). In reviewing a motion to dismiss, "all the allegations of material fact are taken as true and construed in the light most favorable to the non-moving party." Moreover, "to dismiss, it must appear to a certainty that the plaintiff would not be entitled to relief under any set of facts that could be proved." *Wool v. Tandem Computers Inc.*, 818 F.2d 1433, 1439 (9th Cir. 1987). With this standard in mind, the relevant facts as alleged by plaintiff are set forth below.

III. Background

On November 28, 1987, the San Francisco Police Department received a report of a stabbing. George Smoot died as a result of that stabbing, and McCoy was one of two officers assigned to the investigation. As a result of McCoy's investigation, a juvenile suspect was charged with manslaughter. During the course of the investigation, a number of articles were published voicing concerns about the adequacy and competency of that investigation. As a result of such questions being raised

in the community, Chief Jordan asked McCoy to respond to certain handwritten questions regarding the investigation, which at that time was ongoing.

Between November 28, 1987, and August 29, 1990, two complaints were filed against McCoy, with the Office of Citizen Complaints ("OCC"), by Bill Paul, a journalist who had been publicly critical of the investigation, alleging neglect of duty by conducting an inadequate investigation of the Smoot case. On August 29, 1990, the Police Commission upheld a two-day suspension of McCoy, which McCoy served on November 28 and 29, 1990.

The first complaint, McCoy I, was assigned to defendant OCC investigator Shockey, who, on July 1, 1988 issued a report sustaining the neglect of duty charges. The report was approved by defendants Langer and Silva, allegedly with a willful and malicious intent to injure McCoy. Chief Jordan ordered SFPD Management Control to conduct its own investigation which resulted in a recommendation that no charges be sustained. Nevertheless, based on the OCC report Chief Jordan charged McCoy before the Police Commission. Evidentiary hearings were convened beginning March 15, 1989, and lasted through the year, ultimately resulting on January 22, 1990, with the Commission dismissing all charges against McCoy. McCoy alleges violations of due process resulting from, *inter alia*, discovery disputes during the course of these proceedings.

A second OCC complaint was filed by Paul against McCoy on May 18, 1988 ("McCoy II"), alleging that McCoy had improperly called Paul on the telephone to

question him about statements Paul had made. On October 14, 1988, OCC sustained the McCoy II complaint and Chief Jordan notified McCoy of Jordan's intent to suspend McCoy for ten days. While the hearing regarding the suspension was pending before Chief Jordan, and before the completion of cross-examination, Paul died. On February 14, 1990 two weeks after the Police Commission dismissed the McCoy I complaint, Chief Jordan handed down a two day suspension in McCoy II, which McCoy then requested be reviewed by the full Police Commission.

The Police Commission sustained Chief Jordan's action on August 29, 1990. McCoy now alleges that the final written decision of the Police Commission was not handed down until September 13, 1990. McCoy further alleges, in this complaint, that the prosecutor submitted proposed findings of fact to the Police Commission during the interim period between the decision at the August 29 hearing and the September 13 written decision. McCoy served his suspension on November 28 and 29, 1990. McCoy alleges, pursuant to 42 U.S.C. § 1983, that the defendants acted in concert during the course of the McCoy I and II proceedings, an agreement which wrongfully and in bad faith deprived McCoy of due process and resulted, *inter alia*, in deprivations of due process and loss of promotional opportunity.

IV. Analysis

A. Statute of Limitations

The statute of limitations for federal civil rights actions pursuant to 42 U.S.C. § 1983 is one year. *Del Percio*

v. Thornsley, 877 F.2d 785, 786 (9th Cir. 1989). Under California law, where a conspiracy is alleged and proven, the statute of limitations is tolled until the "last overt act" in furtherance of the conspiracy. *Wyatt v. Union Mortg. Co.*, 24 Cal. 3d 773, 786 (1979). McCoy has alleged a civil conspiracy between both the private and public defendants to deprive plaintiffs of due process.

However, it is settled law that while federal courts must adopt the state limitations period for § 1983 claims, federal law governs the time of accrual. *Gibson v. United States,* 781 F.2d 1334, 1341 (9th Cir. 1986). As the *Gibson* court held:

> The Ninth Circuit determines the accrual of civil conspiracies for limitations purposes in accordance with the last overt act doctrine. (citations omitted) Under this doctrine, "injury and damage in a civil conspiracy action flow from the overt acts, not from 'the mere continuance of a conspiracy' ". (citations omitted) Consequently, the cause of action runs separately from each overt act that is alleged to cause damage to the plaintiff and "separate conspiracies may not be characterized as a single grand conspiracy for procedural advantage." (citations omitted).

Id. at 1340. Defendant's contend that the final decision of the Police Commission upholding the suspension, which was handed down on August 29, 1990, is the last overt act in furtherance of the conspiracy.

Plaintiff, meanwhile, now alleges that the written decision is the final act which begins the statute running, and also alleges a continuing conspiracy to withhold discovery material and the improper submission, by the

prosecuting attorney to the Police Commission, of proposed findings of fact. McCoy avers that the conspiracy is continuing, although he alleges no facts in the complaint to support such a contention, and alternatively alleges that the conspiracy ended when the suspension ended on November 29, 1990. Plaintiff's complaint was filed on September 3, 1991.

McCoy's amended complaint adds three new facts which are alleged to cure the statute of limitations defect. First, and primarily, McCoy alleges that the decision of the police commission on August 29 was not final, and only became final when the commission issued written confirmation of that decision. McCoy's contention in this regard is contradicted by the transcript from the proceedings themselves.[1] Commissioner Keker, announcing the unanimous decision of the commission, stated:

> It is the unanimous decision of the Commission to sustain the Chief as to the charge involving the call to Complainant Paul. That's the decision and as to penalty, needless to say, which was a two day suspension. Thank you.

Such decision was final, notwithstanding the written confirmation which was handed down two weeks later. Having been at that hearing, and having heard the commission's decision, McCoy was on notice of his suspension and should have known that that decision would not

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[1] This court may take judicial notice of public proceedings before a quasi-judicial or administrative body in considering a motion to dismiss without converting that motion to one for summary judgment. *See Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986).

change. *See Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980) (civil rights statute of limitations began running when tenure decision was made and communicated to plaintiff). This court finds, therefore, that the statute of limitations began running when the Police Commission announced its decision on August 29, 1990.

McCoy's other arguments designed to avoid the statute of limitations problem also fail. The submission of proposed findings is not an act in furtherance of a conspiracy since the final suspension decision had already been handed down. Moreover, the alleged withholding of exculpatory evidence is not a violation of constitutional dimension considering the ample due process which McCoy has been provided, both before the Chief of Police, before the Police Commission, and in state court. In this case, such withholding does not extend the statute of limitations and cannot be considered an overt act in furtherance of a conspiracy, the objective of which has already been obtained, according to McCoy.

In light of the court's holding on the timeliness issue, the court does not reach or address the other arguments for dismissal raised by defendants.[2] Accordingly, McCoy's complaint is time barred and must be dismissed.

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[2] McCoy has shown remarkable courage in misrepresenting to this court the contents of its own prior order in this case. It is not true that the court found defendants' last motion to dismiss unpersuasive on every ground but the statute of limitations. To the contrary, because the last complaint was' dismissed on statute of limitations grounds, the court did not reach or consider the other issues raised by defendants' motion.

V. Conclusion

In accordance with the above reasoning, the court orders that defendants' motion to dismiss is hereby GRANTED, and McCoy's first amended complaint is dismissed, in its entirety, without leave to amend.

IT IS SO ORDERED.

Dated: June 26, 1992.

/s/ Samuel Conti
United States District Judge

APPENDIX I

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FRANK McCOY Plaintiff, v. THE CITY AND COUNTY OF SAN FRANCISCO, et al., Defendants.	)	No. C 91-2856 SC ORDER RE DEFENDANT'S MOTION TO DISMISS (Filed April 10, 1992)

I. Introduction

This case involves plaintiff, Frank McCoy's ("McCoy"), allegations of deprivation of due process against a vast array of defendants, including the City and County of San Francisco, then-police chief Frank Jordan, and attorneys and investigators who handled the investigations and hearings regarding the competency of a murder investigation undertaken by McCoy, an Inspector with the San Francisco Police Department. This case is presently before the court on defendants motion to dismiss on a variety of grounds, including timeliness and immunity.

II. Legal Standard

The Ninth Circuit standard for a motion to dismiss is as follows:

> . . . a complaint should not be dismissed under Fed. R. Civ. P. 12(b)(6) "unless it appears beyond

> doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).
>
> A complaint may be dismissed as a matter of law for two reasons: (1) lack of a cognizable legal theory or (2) insufficient facts under a cognizable theory. 2A J. Moore, *Moore's Federal Practice* ¶ 12.08 at 2271 (2d ed. 1982).

Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 533-34 (9th Cir. 1984). In reviewing a motion to dismiss, "all the allegations of material fact are taken as true and construed in the light most favorable to the non-moving party." Moreover, "to dismiss, it must appear to a certainty that the plaintiff would not be entitled to relief under any set of facts that could be proved." *Wool v. Tandem Computers Inc.*, 818 F.2d 1433, 1439 (9th Cir. 1987). With this standard in mind, the relevant facts as alleged by plaintiff are set forth below.

III. Background

On November 28, 1987, the San Francisco police Department received a report of a stabbing. George Smoot died as a result of that stabbing, and McCoy was one of two officers assigned to the investigation. As a result of McCoy's investigation, a juvenile suspect was charged with manslaughter. During the course of the investigation, a number of articles were published voicing concerns about the adequacy and competency of that investigation. As a result of such questions being raised in the community, Chief Jordan asked McCoy to respond

to certain handwritten questions regarding the investigation, which at that time was ongoing.

Between November 28, 1987, and August 29, 1990, two complaints were filed against McCoy, with the Office of Citizen Complaints ("OCC"), by Bill Paul, a journalist who had been publicly critical of the investigation, alleging neglect of duty by conducting an inadequate investigation of the Smoot case. On August 29, 1990, the Police Commission upheld a two-day suspension of McCoy, which McCoy served on November 28 and 29, 1990.

The first complaint, McCoy I, was assigned to defendant OCC investigator Shockey, who, on July 1, 1988 issued a report sustaining the neglect of duty charges. The report was approved by defendants Langer and Silva, allegedly with a willful and malicious intent to injure McCoy. Chief Jordan ordered SFPD Management Control to conduct its own investigation which resulted in a recommendation that no charges be sustained. Nevertheless, based on the OCC report Chief Jordan charged McCoy before the Police Commission. Evidentiary hearings were convened beginning March 15, 1989, and lasted through the year, ultimately resulting on January 22, 1990, with the Commission dismissing all charges against McCoy. McCoy alleges violations of due process resulting from, *inter alia*, discovery disputes during the course of these proceedings.

A second OCC complaint was filed by Paul against McCoy on May 18, 1988 ("McCoy II"), alleging that McCoy had improperly called Paul on the telephone to question him about statements Paul had made. On October 14, 1988, OCC sustained the McCoy II complaint and

Chief Jordan notified McCoy of Jordan's intent to suspend McCoy for ten days. While the hearing regarding the suspension was pending before Chief Jordan, and before the completion of cross-examination, Paul died. On February 14, 1990, two weeks after the Police Commission dismissed the McCoy I complaint, Chief Jordan handed down a two day suspension in McCoy II, which McCoy then requested be reviewed by the full Police Commission.

The Police Commission sustained Chief Jordan's action on August 29, 1990, and McCoy served the suspension on November 28 and 29, 1990. McCoy alleges, pursuant to 42 U.S.C. § 1983, that the defendants acted in concert during the course of the McCoy I and II proceedings, an agreement which wrongfully and in bad faith deprived McCoy of due process and resulted, *inter alia*, in deprivations of due process and loss of promotional opportunity.

IV. Discussion

The statute of limitations for federal civil rights actions pursuant to 42 U.S.C. § 1983 is one year. *Del Percio v. Thornsley*, 877 F.2d 785, 786 (9th Cir. 1989). Under California law, where a conspiracy is alleged and proven, the statute of limitations is tolled until the "last overt act" in furtherance of the conspiracy. *Wyatt v. Union Mortg. Co.*, 24 Cal. 3d 773, 786 (1979). Defendant's contend that the final decision of the Police Commission upholding the suspension, which was handed down on August 29, 1990, is the last overt act in furtherance of the conspiracy.

Plaintiff, meanwhile, avers that the conspiracy is continuing, although he alleges no facts in the complaint to support such a contention, and alternatively alleges that the conspiracy ended when the suspension ended on November 29, 1990. Plaintiff's complaint was filed on September 3, 1991.

Were plaintiff able to allege some facts which suggest that the conspiracy continued beyond the final decision of the Police Commission, his argument would be more persuasive. In fact, however, although McCoy contends the conspiracy continues, all his allegations concern the actions taken *prior* to the August 29, 1990, Police Commission decision. Nor is the court persuaded that the actual serving of the suspension can be considered an "overt act". The two day suspension is a consequence, even a goal, of a properly alleged conspiracy, but it cannot be considered an overt act by the conspirators in furtherance of the conspiracy.[1]

The seminal California case on the subject, *People v. Zamora*, 18 Cal. 3d 538, 560 (1976), is to the same effect, and holds that the statute runs "upon successful attainment of the substantive offense which is the primary

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[1] Under McCoy's theory, for example, if three defendants conspired to blow up a building by placing a bomb with a three day delay timer in the basement, the statute of limitations would begin to run when the bomb actually exploded, some three days after defendants had placed the bomb in the basement and set the timer, assuming defendants did nothing more after placing the bomb. The court cannot agree with such a result. In the above example the last overt act must be the actual placement of the bomb and setting of the timer, at which time the statute begins to run.

object of the conspiracy." *See also Livett v. F. C. Financial Associates, Ltd.*, 124 Cal. App. 3d 413, 419 (1981) (once the substantive offense is committed, subsequent conduct related to the conspiracy, such as flight or concealment, does not constitute "overt acts" sufficient to recommence the statutory period). As McCoy has alleged no overt acts which occurred after August 29, 1990, this court has no choice but to find all McCoy's causes of action barred by the one-year statute of limitations.

V. Conclusion

In accordance with the above reasoning, the court orders that defendants' motion to dismiss is hereby GRANTED, and McCoy's complaint is dismissed, in its entirety, without prejudice.

IT IS SO ORDERED.

Dated: April 10, 1992.

/s/ Samuel Conti
United States District Judge

APPENDIX J

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

FRANK C. McCOY et al.,

Plaintiffs and Appellants,

v.

POLICE COMMISSION OF THE CITY AND COUNTY OF SAN FRANCISCO, et al.,

Defendants and Respondents.

A057850

Super.Ct.No. 937744

(Filed Oct. 18, 1993)

In late November of 1987, appellant Frank C. McCoy, a San Francisco Police Department (hereafter the Department) Inspector, was assigned to investigate the stabbing death of George Smoot. Kali Smith, a juvenile, confessed to the killing of Smoot, and was ultimately charged with and convicted of manslaughter.

The police investigation of the Smoot homicide became a matter of community controversy. On March 11, 1988, Bill Paul, President of the Stonewall Gay Democratic Club, attended a meeting with Police Chief Frank Jordan, Captain Tedesco and Randy Schell of Community United Against Violence, among others, during which accusations were made that the Department's investigation was incomplete and biased against the victim,

Smoot, who was "homosexual." The next day, Paul published an article in the "Point of View," in which he complained of the Department's "flawed and biased" investigation, citing specific examples. Paul indicated that he based his criticism of the investigation upon "communications with informed sources. . . . " Paul's article also urged attendance of a community meeting scheduled for March 17, 1988, entitled "The Murder and Defammation [sic] of George Smoot," and promised that a formal request would be made for a "rigorous independent investigation of police conduct in this case."

Appellant was ordered to provide written information concerning the investigation to Chief Jordan in response to the civilian complaints. He followed orders, although loathe to do so for fear of thereby violating juvenile confidentiality laws.

The investigation of the Smoot killing continued, as did the controversy. After Smith was convicted of manslaughter and was awaiting sentencing, his attorney apparently intended to move for a new trial. Articles criticizing the investigation continued to appear in local publications, and the Department became concerned that reports of factual inaccuracies might be prejudicial to the prosecution of the case against Smith.

On April 28, 1988, a complaint was filed against appellant and other officers of the Department with the Office of Citizen Complaints (hereafter OCC) by the Stonewall Gay Democratic Club and the Alice B. Toklas Lesbian and Gay Democratic Club. The complaint, signed by Paul as the "contact for Stonewall," alleged failure of the officers to adequately interview witnesses and collect

physical evidence. A week later, an article in the Bay Area Reporter discussed the complaint; in it, Paul was quoted. On May 13, 1988, appellant received a copy of the OCC complaint against him along with the subsequent Bay Area Reporter article.

On May 17, 1988, appellant telephoned Paul to "find out what information he had in regard to what he was saying, and if he had any other information in regard to the homicide investigation . . . that we may not have been aware of." Appellant was concerned with his perceived "credibility" in the Smith case as it related to the pending new trial motion. Appellant also intended to "show" Paul that the complaint was false. Appellant was not told by his superiors to refrain from discussing the investigation with the public or media, and, in fact, had been encouraged to do so to clarify inaccuracies. As a matter of course appellant had often previously spoken to the media about homicide investigations.

During the conversation,[1] appellant asked Paul if he had drafted the OCC complaint, and if not, who had

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[1] Due to a malfunction, only appellant's part of the conversation was recorded. The entire transcript of the recording reads as follows:

"Yes, may I speak to Bill Paul please[?]

"Yeah, Bill, I'm Frank McCoy, a police inspector, SFPD how are you?

"Bill, the reason I called you, I talked yesterday with one of our people from internal affairs regarding this complaint that was filed and I asked them a couple of questions which they weren't too certain of the answers and I wondered if maybe you could help me[?]

assisted him in doing so. Appellant asked Paul for clarification of the accusations in the complaint and to specify the charges made. Appellant referred to the conversation with Paul in an entry he made in his Chronological Report of Investigation for May 17, 1988; it states: "Called Bill Paul . . . said he had no complaint against McCoy." Appellant also advised OCC Chief Inspector Dan Silva that Paul had "no complaint" against him.

Paul filed a second complaint against appellant with the OCC on May 18, 1988, in which he objected to the telephone call made to him by appellant. Following the filing of the second complaint by Paul,[2] the OCC issued a

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"And I have no problem, by the way with the complaint that you filed, none whatsoever.

"I do have a question, a [sic] did you make out this co mplaint?

"Ok, who helped you with that?

"Are they representing you? What's their involvement?

"Ok, did they come to you with this case?

"Did you go to them?

"Ok, who was it that you contacted?

"Well that's up . . . It's . . . I, there's no reason I can't call you why do you think I can't call you?

"Well, I . . . Let me explain . . . Let me ask you this, there's allegations in here that I'm calling you to clarify, they're not clarified in your complaint. That's all. And I'll tell you what they are, if you want to listen. What specifically in this complaint have you charged me with?

"Ok, that's all I wanted to know. Ok."

[2] A similar complaint was filed the same day by Jay Newquist, with whom appellant had also discussed the first

report to Chief Jordan on June 1, 1988, in which three of the four charges in *McCoy I* were sustained. Meanwhile, the controversy surrounding the investigation of the Smoot killing persisted.

On June 28, 1988, the Department passed Resolution 1159-88 which directed members to "Provide full assistance in the expeditious and impartial processing of citizen complaints" in compliance with General Order L-1, and further advised members to refrain from 1) threatening, intimidating, misleading or harassing OCC complainants, and 2) discussing an OCC complaint with the complainant or witnesses. Resolution 1159-88 was issued by the Department on July 5, 1988.

Based upon the OCC report in *McCoy I*, Chief Jordan charged appellant on September 7, 1988, with two violations of General Order D-1, Rule A-9, which states: "Any breach of the peace, neglect of duty, misconduct or any conduct on the part of any member either within or without the state which tends to subvert the good order, efficiency or discipline of the department or which reflects discredit upon the department or any member thereof or that is prejudicial to the efficiency and discipline of the department, though such offenses are not specifically defined or laid down in these Rules and

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OCC complaint. The Newquist complaint was dismissed, and is not at issue in this appeal.

We will hereafter refer to the proceeding on the original complaint filed against appellant on April 28, 1988, as *McCoy I*; the second complaint filed by Paul on May 18, 1988, will be referred to as *McCoy II*.

Procedures shall be considered unofficer-like conduct triable and punishable by the Board." On October 14, 1988, the OCC issued a notice to appellant that the charges in *McCoy II* had been sustained; in January of 1989, appellant was served with notice of the Department's intention to impose a ten-day suspension.

Appellant thereafter requested and was granted a "*Skelly* hearing" to review the OCC findings. The hearing commenced on March 28, 1989. Appellant claimed that he did not contact Paul for the purpose of intimidating him or even to discuss the OCC complaint, but rather only in the course of investigating the Smoot homicide. Paul testified that the "tone" of appellant's remarks during the recorded conversation of May 17, 1988, was "intimidating," and suggested that the "tape" may have been altered. The disciplinary hearing was adjourned and continued upon motion of the Department before the conclusion of the cross-examination of Paul. The next day, Paul died. The hearing was concluded on June 1, 1989, and submitted for decision.

On January 3, 1990, the Commission dismissed the charges in *McCoy I* for lack of evidence. On February 14, 1990, the Department, per Chief Jordan, found in *McCoy II* that appellant had violated Rule A-9 of General Order D-1 by contacting Paul, an OCC complainant. The Department further found that the "focus" of the telephone call to Paul was "on the complaint and not for the purpose of gathering evidence for the homicide case." Appellant was ordered suspended from his duties for two days, with commensurate loss of pay.

Appellant was granted an appeal of his suspension by the Commission. After an administrative evidentiary hearing in May and June of 1990, and oral arguments before the Commission on August 29, 1990, Resolution No. 645-90 was adopted on September 13, 1990, in which it was concluded that appellant's conduct constituted a violation of General Order D-1, Rule A-9. Appellant was found by the Commission to have "[u]ndermined the public confidence in the independent process of citizen complaint investigations" by contacting complainant Paul. The Commission sustained the findings of Chief Jordan and the two-day suspension imposed appellant as discipline. (*Ibid.*)

Appellant subsequently filed a petition for writ of administrative mandamus (Code Civ. Proc., § 1094.5) and damages (Code Civ. Proc., §1095), along with a complaint for declaratory relief (Code Civ. Proc., § 1060) seeking to set aside his disciplinary suspension. The trial court denied the petition and sustained the findings of the Commission. This appeal followed.

Appellant argues that General Order D-1, Rule A-9 (hereafter Rule A-9), which has been relied upon by the Department as the basis for his suspension, is unconstitutionally vague and uncertain. He complains that the standards of punishable misconduct stated in Rule A-9 fail to provide "fair warning," and, therefore, violate substantive due process principles. Appellant maintains that he was "disciplined . . . solely for having discussed a homicide investigation complaint with Bill Paul," which was not conduct he had reason to know would subject him to

sanctions. He submits that a general disciplinary regulation such as Rule A-9 is "invalid for want of fair warning" unless it proscribes conduct which is: "either unlawful; admitted to have been improper; or committed in disregard of some more . . . specific administrative guidelines or personal admonishment."

We proceed from the accepted premise that "if a disciplinary standard is so vague that no reasonable consensus may be formed as to its proper meaning, its application is constitutionally suspect. [Citation.]" (*In re Kelley* (1990) 52 Cal.3d 487, 496.) " 'The requirement of a reasonable degree of certainty in legislation . . . is a well established element of the guarantee of due process of law.' [Citation.]" (*People v. Superior Court (Caswell)* (1988) 46 Cal.3d 381, 389.) Civil as well as criminal statutes and administrative regulations must be sufficiently clear as to give adequate warning of the prohibited conduct and establish a standard of conduct which can be uniformly interpreted by the judiciary and administrative agencies. (*Cranston v. City of Richmond* (1985) 40 Cal.3d 755, 763-764; *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 231; *Abella v. Riverside Unified Sch. Dist.* (1976) 65 Cal.App.3d 153, 169; *Hall v. Bureau of Employment Agencies* (1976) 64 Cal.App.3d 482, 491.) A statute which "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law. [Citations.]" (*Connelly v. General Construction Co.* (1926) 269 U.S. 385, 391; see also *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1200; *People v. Barksdale* (1972) 8 Cal.3d 320, 327.) A statute must also provide sufficiently definite

guidelines to prevent arbitrary and discriminatory enforcement. (*Grayned v. City of Rockford* (1972) 408 U.S. 104, 108-109; *People v. Superior Court (Caswell), supra,* 46 Cal.3d at p. 390; *In re Alberto R.* (1991) 235 Cal.App.3d 1309, 1316; *People v. McGirr* (1988) 198 Cal.App.3d 629, 634.)

To satisfy the dictates of due process, a statute need not be imbued with mathematical precision. (*People v. Superior Court (Caswell), supra,* 46 Cal.3d at p. 391; *City of Los Altos v. Barnes* (1992) 3 Cal.App.4th 1193, 1202; *Findley v. Justice Court* (1976) 62 Cal.App.3d 566, 570.) Fair notice requires only that a violation be described with reasonable certainty. (*Burg v. Municipal Court* (1983) 35 Cal.3d 257, 269; *County of Nevada v. MacMillen* (1974) 11 Cal.3d 662, 673; *People v. Superior Court (Holvey)* (1988) 205 Cal.App.3d 51, 59.) " ' " '[T]he Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the Proscribed conduct when measured by common understanding and practices. . . . ' [Citation.]" ' " (*Eckl v. Davis* (1975) 51 Cal.App.3d 831, 849; quoting from *Roth v. United States* (1957) 354 U.S. 476, 491-492; see also *People v. McGirr, supra,* 198 Cal.App.3d at p. 635.)

Reducing the wide range of conduct regulated by statutes to a fixed, precise standard is not possible. (*In re Alberto R., supra,* 235 Cal.App.3d at p. 1317; *People v. McGirr, supra,* 198 Cal.App.3d at p. 635.) Thus, a statute does not offend due process standards, despite imprecise language, " ' "if its terms may be made reasonably certain by reference to other definable sources."' [Citations.]" (*County of Nevada v. MacMillen, supra,* 11 Cal.3d 662, 673; *Fletcher v. Western National Life Ins. Co.* (1970) 10

Cal.App.3d 376, 405.) Where the requisite certainty is not apparent on the face of the statute, the courts may look to " common understanding and practices' " and to " 'any demonstrably established technical or common law meaning of the language' " to find the fair warning the Constitution requires. (*People v. Davenport* (1985) 41 Cal.3d 247, 266; *People v. Barksdale, supra,* 8 Cal.3d 320, 327.) Also, in determining the sufficiency of the notice, a statute must necessarily be examined in light of the conduct which it regulates and the facts of the case. (*Cranston v. City of Richmond, supra,* 40 Cal.3d at p. 764; *People v. Serrata* (1976) 62 Cal.App.3d 9, 22; *People v. Anderson* (1972) 29 Cal.App.3d 551, 561.)

Appellant was suspended pursuant to Rule A-9, which defines punishable conduct as that "which tends to subvert the good order, efficiency or discipline of the department or which reflects discredit upon the department or any member thereof or that is prejudicial to the efficiency and discipline of the department. . . . " By necessity, Rule A-9 lacks precision in order to account for the great variety of police conduct which must be regulated to promote the legitimate policies and objectives of the Department. But lack of specificity does not necessarily equate with vagueness. To avoid the constitutional proscription against vagueness, a statute need not "furnish detailed plans and specifications of the acts or conduct prohibited." (*Sunset Amusement Co. v. Board of Police Commissioners* (1972) 7 Cal.3d 64, 73, internal quotes deleted.) Lack of clarity of language or statutory definition of terms may be supplied by the "common knowledge and understanding of members of the particular vocation or profession to which the statute applies."

(*Cranston v. City of Richmond, supra,* 40 Cal.3d at p. 765; see also *Pasadena Police Officers Assn. v. City of Pasadena* (1990) 51 Cal.3d 564, 575; *Hand v. Board of Examiners* (1977) 66 Cal.App.3d 605, 622; *Hall v. Bureau of Employment Agencies, supra,* 64 Cal.App.3d 482, 492.) We also recognize that police officers occupy a unique position of trust which subjects them to a higher standard of conduct and demands awareness of behavior which may reflect adversely upon the Department. (*Pasadena Police Officers Assn. v. City of Pasadena, supra,* 51 Cal.3d at p. 572; *Cranston v. City of Richmond, supra,* 40 Cal.3d at p. 766; *Talmo v. Civil Service Com.* (1991) 231 Cal.App.3d 210, 231; *Bailey v. City of National City* (1991) 226 Cal.App.3d 1319, 1328; *Nicolini v. County of Tuolumne* (1987) 190 Cal.App.3d 619, 632-633.) We would, accordingly, find Rule A-9 constitutionally valid if appellant's conduct fit more explicitly within its scope. (Cf. *Cranston v. City of Richmond, supra,* at pp. 771-772; *Nightingale v. State Personnel Board* (1972) 7 Cal.3d 507, 512; *Bailey v. City of National City, supra,* at p. 1329; *Perea v. Fales, supra,* 39 Cal.App.3d at p. 942.)

Our inquiry is not limited to a facial determination of the constitutional validity of Rule A-9, however. We must determine appellant's vagueness challenge to Rule A-9 not merely in the abstract, but also "in the light of the facts of the case at hand." (*United States v. Mazurie* (1975) 419 U.S. 544, 550; *United States v. Powell* (1975) 423 U.S. 87, 92; *Cranston v. City of Richmond, supra,* 40 Cal.3d 755, 764.) "This is so because '[v]oid for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed. In determining the sufficiency of

the notice a statute must of necessity be examined in the light of the conduct with which a defendant is charged.' (*United States v. National Dairy Products Corp.* (1963) 372 U.S. 29, 32-33 [9 L.Ed.2d 561, 565-566, 83 S.Ct. 594], rehg. den., 372 U.S. 961 [10 L.Ed.2d 13, 83 S.Ct. 1011], citations omitted.)" (*Cranston v. City of Richmond, supra,* 40 Cal.3d at p. 764.

Upon review of the record before us, we believe that Rule A-9 did not provide sufficiently intelligible guidelines to advise appellant of the possible impropriety of his particular conduct. Appellant was presented with the dilemma of an ongoing homicide investigation, about which Paul might have been able to provide illuminating information, and a citizen complaint which demanded that he eschew conduct creating the appearance of impropriety under Rule A-9. But he was not provided by Rule A-9 or departmental guidelines[3] with either specific procedures to be followed or strictures to be avoided. (Cf. *Hall v. Bureau of Employment Agencies, supra,* 64 Cal.App.3d 482, 493.) Rule A-9 failed to furnish him with objective, ascertainable standards to guide the delicate matter of his seemingly necessary contact with a citizen complainant. (*Jabola v. Pasadena Redevelopment Agency* (1981) 125 Cal.App.3d 931, 935; *California School Employees Assn. v. Foothill Community College Dist.* (1975) 52 Cal.App.3d 150, 156.) Accordingly, we are unable to find appellant's conduct so indicative of "unfitness to perform

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[3] Resolution 1159-88 had not yet been enacted to clarify Rule A-9 in this regard.

the functions of a police officer" as to be clearly proscribed by the very general language of Rule A-9.[4] (Cf. *Cranston v. City of Richmond, supra,* 40 Cal.3d at pp. 769-770; see also *Morrison v. State Board of Education, supra,* 1 Cal.3d at p. 233; *Nicolini v. County of Tuolumne, supra,* 190 Cal.App.3d at p. 633; *Perea v. Fales* (1974) 39 Cal.App.3d 939, 942.) On the contrary, we are persuaded that, as applied to appellant's conduct, Rule A-9 failed to provide constitutionally adequate notice, and, therefore, cannot be relied upon by the Department to justify the discipline imposed upon him.

Accordingly, the judgment is reversed and the case is remanded to the trial court for proceedings not inconsistent with the views expressed herein.[5] Costs on appeal are awarded to appellant.

Newsom, J.

WE CONCUR:

Strankman, P.J.

Dossee, J.

[4] In so stating, we do not dispute the factual determinations of the administrative tribunal and the trial court that appellant was not merely pursuing the homicide investigation when he telephoned Paul to discuss the OCC complaint.

[5] In light of this conclusion, we need not address appellant's First Amendment challenge to Rule A-9 or his claim of laches.

APPENDIX K

[SEAL]

OFFICE OF
THE POLICE COMMISSION
CITY AND COUNTY OF SAN FRANCISCO
HALL OF JUSTICE
850 BRYANT STREET
SAN FRANCISCO, CA 94103

LOUIS J. GIRAUDO, PRESIDENT
JOHN W. KEKER, VICE PRESIDENT
PIUS LEE, COMMISSIONER
GWENN CRAIG, COMMISSIONER
EDWARD J. CAMPANA, COMMISSIONER

LIEUTENANT WILLIE E. FRAZIER
SECRETARY

September 13, 1990

W/5844M

Honorable Civil Service Commission
City Hall, Room 151
San Francisco, CA 94102

Employees' Retirement System
1155 Market Street
San Francisco, CA 94103

Dear Ladies and Gentlemen:

At a meeting of the Police Commission on Wednesday, August 29, 1990, the following proceeding was held:

APPEAL OF THE CHIEF'S SUSPENSION IMPOSED ON POLICE INSPECTOR FRANK McCOY, HOMICIDE SECTION

The decision on the appeal of the Chief's suspension imposed on Police Inspector Frank McCoy, Homicide Section, was called, it having been continued from the meeting of August 22, 1990.

Mr. Jerry Akins, Attorney at Law, appeared on behalf of the San Francisco Police Department.

Police Inspector Frank McCoy appeared in person and was represented by Mr. James Lassart, Attorney at Law. Mr. James Lassart made a motion to dismiss the charges made against Inspector Frank McCoy.

Mr. Jerry Akins made a closing statement for the Prosecution.

Mr. James Lassart made a closing statement for the Defense.

All Commissioners acknowledged reading the transcripts of proceedings on the evidentiary hearings and listening to tapes of evidence presented.

Pursuant to the rules of the Commission, Commissioner Keker ruled on the motions made by the accused officer. The motion to dismiss the charges on res judicata and collateral estoppel grounds was denied; the motion to dismiss on First Amendment grounds was denied as to OCC complainant Bill Paul, and granted as to journalist Jay Newquist.

The Commission took the matter under submission, recessed and returned, and the following resolution was adopted:

RESOLUTION NO. 645-90

DECISION ON THE APPEAL OF THE CHIEF'S SUSPENSION IMPOSED ON INSPECTOR FRANK McCOY

WHEREAS, on June 1, 1989, the Chief's Disciplinary Hearing was concluded to determine whether Inspector Frank McCoy should be suspended from his duties as an inspector for engaging in conduct which constitutes violations of Rule I-B of General Order L-1 and Rule A-9 of General Order D-1 of the San Francisco Police Department; and

WHEREAS, after considering the evidence, argument and discussion at the hearing and further written arguments submitted by Inspector McCoy's counsel, it was found that the accused has engaged in the following conduct, which constitutes violation of Rule A-9 of General Order D-1 of the San Francisco Police Department; and

WHEREAS, on May 17, 1988, Inspector McCoy made a phone call to OCC complainant Bill Paul and a separate call to Jay Newquist concerning a complaint being investigated by the OCC. Although not intimidating in tone of voice, the questions asked by the accused to Paul and Newquist concerned a complaint made to OCC about the conduct of a homicide investigation. The focus of both calls was on the complaint and not for the purpose of gathering evidence for the homicide case; and

WHEREAS, by contacting Mr. Paul and Mr. Newquist and questioning them about an OCC complaint, Inspector McCoy undermined the public confidence in the independent process of citizen complaint investigations, and

WHEREAS, the accused's conduct in this matter violates Rule A-9 of General D-1, which states:

> "Any breach of the peace, neglect of duty, misconduct or any conduct on the part of any member either within or without the state which tends to subvert the good order efficiency or discipline of the department or which reflects discredit upon the department or any member thereof or that is prejudicial to the efficiency and discipline of the department, though such offenses are not specifically defined or laid down in these Rules and Procedures shall be considered unofficer-like conduct triable and punishable by the Board."

and

WHEREAS, pursuant to Section 8.343 of the Charter of the City and County of San Francisco, the Chief of Police suspended Inspector McCoy from his duties as an inspector for two (2) days; and

WHEREAS, the Commission unanimously finds that the findings of the Chief supporting the two-day suspension imposed on Inspector Frank McCoy are sustained by a preponderance of evidence presented; therefore be it

RESOLVED, that based on these findings consistent with the Commission's duty to protect the health, safety and general welfare of the citizens of the City and County of San Francisco and the public in general, and in order to promote efficiency and good discipline in the San Francisco Police Department, the Commission sustains the two-day suspension imposed on Inspector Frank McCoy by the Chief of Police. Said suspension shall commence

on Wednesday, November 28, 1990 at 0001 hours and end Thursday, November 20, 1990 at 2400 hours.

AYES: Commissioners Campana, Craig, Giraudo, Keker, Lee

Recess taken during the hearing of Inspector McCoy:

9:24 p.m. to 9:45 p.m.

(The entire proceedings were taken in shorthand form by Ms. Linda Pransky, CSR.

Very truly yours,

/s/ Willie E. Frazier
Lieutenant Willie E. Frazier
Secretary
THE POLICE COMMISSION

942/fs

cc: Attorney J. Akins, Management Control Division, Personnel, Payroll, Lt. G. McCarthy/Homicide Section, Attorney J. Lassart, Inspector F. McCoy.

APPENDIX L

[SEAL]

OFFICE OF
THE POLICE COMMISSION
CITY AND COUNTY OF SAN FRANCISCO
HALL OF JUSTICE
850 BRYANT STREET
SAN FRANCISCO, CA 94103

LOUIS J. GIRAUDO, PRESIDENT
JOHN W. KEKER, COMMISSIONER
PIUS LEE, COMMISSIONER
GWENN CRAIG, COMMISSIONER
JOSE EMILIO MEDINA, COMMISSIONER

LIEUTENANT WILLIE E. FRAZIER
SECRETARY

January 22, 1990

File No.
C89-70 MEG

Frank M. Jordan
Chief of Police

Dear Chief Jordan:

At a Special Meeting of the Police Commission on Wednesday, January 3, 1990, the following proceeding was held:

CONSIDERATION OF MOTION FOR DISMISSAL ON DISCIPLINARY CHARGES FILED AGAINST POLICE INSPECTOR FRANK C. McCOY, INVESTIGATIONS BUREAU - HOMICIDE SECTION

The hearing on the consideration of Motion for Dismissal on Disciplinary charges filed against Police Inspector Frank C. McCoy, Investigations Bureau – Homicide Section, was called it having been set for this date.

Inspector Frank C. McCoy appeared in person and was represented by Mr. James Lassart, Attorney at Law.

Mr. Jerry Akins, Attorney at Law, appeared on behalf of the San Francisco Police Department.

An opening statement was made by Mr. Jerry Akins, giving oral arguments as to why charges should not be dismissed.

The following defense attorneys gave opening statements giving oral arguments to support their written Motion for Dismissal of Charges:

Mr. Stephen Bley, Ms. Carole Seliger, Mr. John Prentice and Mr. James Lassart

The Commission took the matter under submission, recessed and returned, and the following resolution was adopted:

RESOLUTION NO. 1-90

DECISION ON MOTION FOR DISMISSAL ON DISCIPLINARY CHARGES FILED AGAINST POLICE INSPECTOR FRANK C. McCOY, INVESTIGATIONS BUREAU – HOMICIDE SECTION

RESOLVED, that it is the unanimous decision of the Police Commission that the charges filed against Police Inspector Frank C. McCoy is hereby dismissed.

Thereafter, Commissioner Giraudo asked his fellow Commissioners if any of them had comments in respect to the final findings.

The only Commissioner to comment was Commissioner Craig whose comments were as follows:

> This is not just another case, not just another disciplinary hearing. It reverberates with issues that have haunted us all – Black, Brown, Asian, lesbian and gay. It is about equal protection, it is about fairness, it is about a just response from the police force we depend upon to protest [sic] us and keep us safe.
>
> Some will say that because this case is weighed with those issues, that our response to it should also be weighed with our abhorrence of those practices. I accept that, that is, in fact so. In examining these charges, this Commission has delved deeper, heard more testimony, taken longer to study the facts, because we do respect the significance and weight of the issues which surround this case.
>
> What I cannot accept, however, is that we ought to be anything other than fair and just, even in cases where there has been unfairness and injustice. That is our mandate. And that is also what we must do if we are to honor the justice we ask for. Wrong means never end up in right results.
>
> Issues of fairness must stand or fall on facts, not on assumptions about attitude or prejudice. There can be no dividing line between doing what is right on the merits and what is good politics for any community. I will not cast a vote for political purposes, to satisfy any claim but the claim of justice itself.

As a Black woman, and as a lesbian, I have too often seen actions spurred by putting prejudicial assumptions over fact to make that same error myself. I would try to save us from that error, even in cases in which, as this one does, issues about the administration of justice and equal protection are tantamount and call forth years of experience with questionable judgments of the past. Such charges have not been proved in this case, and I will not cast a vote that pretends that it has – either to balance past injustices or to balance ongoing ones.

The presence of those who brought these charges would not have changed the outcome of this case, but it would have meant that those who initiated this process staye' to witness its results. I regret that this has not happened, but I understand that, in a community with so many crises before it, this is sometimes not possible. Indeed, the individual who spurred the OCC complaint, Bill Paul, is himself dead now – 20 months after this began. Defendants are fully entitled to avail themselves of all legal processes, though in this case, their tactics have delayed this results [sic] past one lifetime too many.

If we cause these four officers before us today to pay for the injustice and unfair treatment we know to exist in the enforcement of laws, then we make them victims of injustice at our own hands. We must not match injustice with another injustice. Perhaps some would not blink to do so, but it would offend my own personal sense of morality.

Other issues have arisen as a result of this case. By attempting to prove the inadequacies of

police investigatory practices in the Smoot matter, the OCC has laid bare the inadequacies of their own investigatory skills. This can be seen as a positive result if it causes this Commission and this department to take steps now to increase the OCC's competence and increase the public's confidence in their work.

We have heard in the past, in particular from the Mayor, proposals to strengthen one aspect of the OCC: by having it report directly on sustained charges to this Commission rather than through the Chief. I agree with the Mayor on that proposal, and plan at the next possible Commission meeting to propose a policy statement from us endorsing the Mayor's proposal.

As a result of this case, I will also ask that this Commission expand our agenda to include strengthening the OCC's investigatory capabilities. I will suggest the establishment of a committee to provide Commission input on other proposals regarding OCC reform and OCC strengthening.

At the same time, I believe that this Commission must move actively to address the concerns raised by the Human Rights Commission and the Board of Supervisors on matters relative to the OCC and other management issues. The committee I will suggest should also undertake a formal review and provide a public response to the issues raised by these official bodies.

In dismissing these charges, we are saying the OCC investigation and the subsequent disciplinary hearing failed to satisfy our need to know the facts. Fairness dictates that we do not prolong a charade that is clearly incapable of bringing the necessary facts to light. And so, out of

fairness, I cast my vote to dismiss these charges. But out of a sense of justice, I will not let this close the chapter on our inability to restore public confidence that this department has acted in a way that respects the dignity of each and every person.

AYES: Commissioners Craig, Giraudo, Keker, Lee, Medina

Very truly yours,

/s/ Willie E. Frazier
Lieutenant Willie E. Frazier
Secretary
THE POLICE COMMISSION

942/fs
W/5376

cc: Attorney J. Akins,
Management Control Division
Personnel
Capt. R. Fife, Investigations
Attorney J. Lassart
Inspector F. McCoy

APPENDIX M

The Public Safety Officers Procedural Bill of Rights Act

Section 3301 of the Government Code of the State of California provides in pertinent part:

> "The Legislature hereby finds and declares that the rights and protections provided to peace officers under this chapter constitute a matter of statewide concern. The Legislature further finds and declares that effective law enforcement depends on the maintenance of stable employer-employee relations, between public safety employees and their employers. In order to assure that stable relations are continued throughout the state and to further assure that effective services are provided to all people of the state, it is necessary that this chapter be applicable to all public safety officers, . . . wherever situated within the State of California."

At times material, Section 3303(f) of the Government Code of the State of California provided, and Government Code § 3303(g) now provides, in pertinent part:

> "The public safety officer shall be entitled to a transcribed copy of any notes made by a stenographer or to any reports or complaints made by investigators or other persons, except those which are deemed by the investigating agency to be confidential."

Section 3304(a) of the Government Code of the State of California provides in pertinent part:

> "No public safety officer shall be subjected to punitive action, or denied promotion, or be threatened with any such treatment, because of

the lawful exercise of the rights granted under this chapter. . . . "

Section 3304(b) of the Government Code of the State of California provides in pertinent part:

> "No punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by any public agency without providing the public safety officer with an opportunity for administrative appeal."

Section 3309.5(a) of the Government Code of the State of California provides in full:

> "It shall be unlawful for any public safety department to deny or refuse to any public safety officer the rights and protections guaranteed to them by this chapter."

Administrative Mandamus

Section 1094.5(a) of the Code of Civil Procedure of the State of California provides in pertinent part:

> "Where the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as a result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer, the case shall be heard by the court sitting without a jury."

Section 1094.5(b) of the Code of Civil Procedure of the State of California provides in full:

> "The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence."

Section 1094.5(f) of the Code of Civil Procedure of the State of California provides in pertinent part:

> "The court shall enter judgment either commanding respondent to set aside the order or decision, or denying the writ."

The Rules of Professional Conduct

Rule 5-200(A) of the Rules of Professional Conduct approved by the Supreme Court of the State of California provides in full:

> "In presenting a matter to a tribunal, a member . . . [s]hall employ, for the purpose of maintaining the causes confided to the member such means only as are consistent with truth[.]"

Rule 5-200(B) of the Rules of Professional Conduct approved by the Supreme Court of the State of California provides in full:

> "In representing a matter to a tribunal, a member . . . [s]hall not seek to mislead the

judge, judicial officer, or jury by an artifice or false statement of fact or law."

As adopted November 28, 1988 and effective May 27, 1989, Rule 5-220 of the Rules of Professional Conduct approved by the Supreme Court of the State of California provides in full:

> "A member shall not suppress any evidence that the member or the member's client has a legal obligation to reveal or to produce."

As adopted November 28, 1988 and effective May 27, 1989, Rule 5-300(B) of the Rules of Professional Conduct approved by the Supreme Court of the State of California provides in full:

> "A member shall not directly or indirectly communicate with or argue to a judge or judicial officer upon the merits of a contested matter pending before such judge or judicial officer, except:
>
> (1) In open court; or
> (2) With the consent of all other counsel in such matter; or
> (3) In the presence of all other counsel in such matter; or
> (4) In writing with a copy thereof furnished to such other counsel; or
> (5) In ex parte matters."

The Charter of the City and County of San Francisco

At times material, Section 3.500(a) of the Charter of the City and County of San Francisco provided in pertinent part as follows:

> "Each . . . commission appointed by the mayor, or otherwise provided by this charter, shall have powers and duties as follows: . . . To prescribe reasonable rules and regulations not inconsistent with this charter for the conduct of its affairs, for the . . . performance of its business, for the conduct and government of its officers and employees, and for the administration, custody and protection of property under its control and books, records and papers appertaining to its affairs. . . . "

At times material, Section 3.530 of the Charter of the City and County of San Francisco provided in pertinent part as follows:

> "The police department shall consist of a police commission, a chief of police, a police force, an office of citizen complaints . . . , and shall be under the management of a police commission consisting of five members who shall be appointed by the mayor. . . . "

At times material, Section 3.532 of the Charter of the City and County of San Francisco provided in full as follows:

> "The police commission shall appoint a chief of police who shall hold office at its pleasure."

At times material, Section 3.530-2 of the Charter of the City and County of San Francisco provided in pertinent part as follows:

> "The police commission shall have the power and duty to appoint a director of the office of citizen complaints who shall hold office at its pleasure. The appointment shall be exempt from the civil service requirements of this charter. . . . The director of the office of citizen complaints shall be the appointing officer under the civil service provisions of this charter for the appointment, removal or discipline of employees of the office of citizen complaints.
>
> "The police commission shall have the power and duty to organize, recognize [sic], and manage the office of citizen complaints,. . . .
>
> "Complaints of police misconduct or allegations that a member of the police department has not properly performed a duty shall be promptly, fairly, and impartially investigated by staff of the office of citizen complaints. . . . The office of citizen complaints shall recommend disciplinary action to the chief of police on those complaints that are sustained."

At times material, Section 8.343 of the Charter of the City and County of San Francisco provided in pertinent part as follows:

> "Members of the uniformed ranks of the fire or the police departments guilty of any offense or violation of the rules and regulations of their respective departments, shall be liable to be punished by reprimand, or by fine not exceeding one month's salary for any offense, or by suspension for not to exceed three months, or by

dismissal, after trial and hearing by the commissioners of their respective departments; provided, however, that the chief of each respective department for disciplinary purposes may suspend such member for a period not to exceed ten days for violation of the rules and regulations of his department. Any such member so suspended shall have the right to appeal such suspension to . . . the police commission, . . . and have a trial and hearing on such suspension. . . .

"Subject to the foregoing, members of the uniformed ranks of either department shall not be subject to dismissal, nor to punishment for any breach of duty or misconduct, except for cause, nor until after a fair and impartial trial before the commissioners of their respective departments, upon a verified complaint filed with such commission setting forth specifically the acts complained of,. . . . The accused shall be entitled, upon hearing, to appear personally and by counsel; to have a public trial; and to secure and enforce, free of expense, the attendance of all witnesses necessary for his defense."

General Order D-1 Rule A-9

At times material, San Francisco Police Department General Order D-1 Rule A-9 provided in full as follows:

"Any breach of the peace, neglect of duty, misconduct or any conduct on the part of any member either within or without the state which tends to subvert the good order, efficiency or discipline of the department or which reflects discredit upon the department or any member thereof or that is prejudicial to the efficiency and discipline of the department, though such

offenses are not specifically defined or laid down in these Rules and Procedures shall be considered unofficer-like conduct triable and punishable by the Board."

APPENDIX N

JAMES A. LASSART
ADRIAN G. DRISCOLL
ROPERS, MAJESKI, KOHN,
BENTLEY, WAGNER & KANE
670 Howard Street
San Francisco, California 94105
(415) 543-4800

Attorneys for Plaintiff
FRANK McCOY

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

* * *

FRANK McCOY, Plaintiff, v. THE CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation; THE SAN FRANCISCO POLICE COMMISSION, a Public Entity Department of the City and County of San Francisco, OFFICE OF CITIZEN COMPLAINTS, a Public Entity Department of the City and County of San Francisco; FRANK JORDAN, Individually and in his official capacity as Chief of Police of the San Francisco Police Department;	No. C-91-2856-SC **SECOND AMENDED COMPLAINT FOR DAMAGES (VIOLATION OF CIVIL RIGHTS)** (Filed April 29, 1992)

MICHAEL A. LANGER, Individually and in his official capacity as Director of the Office of Citizen Complaints; DANIEL SILVA, Individually and in his official capacity as Chief Investigator of the Office of Citizen Complaints; LAWRENCE SHOCKEY, Individually and in his official capacity as Special Investigator of the Office of Citizen Complaints; MICHAEL GASH, Individually and in his official capacity as Attorney for the San Francisco Police Department; MARIAM MORLEY, Individually and in her official capacity as Deputy City Attorney; ARTHUR HARTINGER, as Deputy City Attorney, Individually and in his official capacity, and DOES 1-50,

Defendants.

Plaintiff FRANK McCOY by and through his attorneys, does complain and allege as follows:

JURISDICTION AND VENUE

1. This is a civil action arising under the laws and Constitution of the United States, therefore jurisdiction of this court exists pursuant to 28 U.S.C. § 1331. This action involves a violation of federal law pursuant to 42 U.S.C. §§ 1983, 1986, 1988.

2. Venue in the Northern District of California is proper as the causes of action alleged in this Complaint occurred in the County of San Francisco, a county within said district.

PARTIES

3. Plaintiff FRANK McCOY is a citizen of the United States of America and is a resident of the City of San Francisco, County of San Francisco, State of California.

4. Defendant CITY AND COUNTY OF SAN FRANCISCO is, and at all times mentioned in this Complaint was, a Municipal Corporation, organized and existing under the laws of the State of California.

5. Defendant SAN FRANCISCO POLICE COMMISSION is, and at all times mentioned in this Complaint was, a branch of the police department of the City and County of San Francisco, organized and existing under the laws of the City and County of San Francisco.

6. Defendant OFFICE OF CITIZEN COMPLAINTS is, and at all times mentioned in this Complaint was, an Office of the Police Commission of the City and County of San Francisco, organized and existing under the laws of the City and County of San Francisco.

7. Defendant FRANK JORDAN was at all times relevant in this Complaint the Chief of Police of Defendant CITY AND COUNTY OF SAN FRANCISCO. Defendant JORDAN is, and at all times mentioned in this Complaint was, a resident of the County of San Francisco, State of California.

8. Defendant MICHAEL A. LANGER is, and at all times mentioned in this Complaint was, the Director of the Office of Citizen Complaints. Defendant LANGER is, and at all times mentioned in this Complaint was, a resident of the State of California.

9. Defendant LAWRENCE SHOCKEY is, and at all times mentioned in this Complaint was, an employee of the City and County of San Francisco, employed as an Investigator for the Office of Citizen Complaints. At all times mentioned in this Complaint, Defendant SHOCKEY was a resident of the State of California.

10. Defendant MICHAEL GASH was at all times mentioned in this Complaint an employee of the City and County of San Francisco, employed as an attorney for the San Francisco Police Department. Defendant GASH is a resident of the State of California.

11. Defendant DANIEL SILVA is, and at all times mentioned in this Complaint was, an employee of the City and County of San Francisco, employed as an Investigator for the Office of Citizen Complaints. At all times mentioned in this Complaint, Defendant SILVA was a resident of the State of California.

12. Defendant MARIAM MORLEY is, and at all times mentioned in this Complaint was, an employee of the City and County of San Francisco, employed as a Deputy City Attorney for the City Attorney's Office. At all times mentioned in this Complaint, Defendant MORLEY was a resident of the State of California.

13. Defendant ARTHUR HARTINGER is, and at all times mentioned in this Complaint was, an employee of

the City and County of San Francisco, employed as a Deputy City Attorney for the City Attorney's Office. At all times mentioned in this Complaint, Defendant HARTINGER was a resident of the State of California.

14. In doing the acts alleged in this Complaint, Defendants JORDAN, LANGER, SHOCKEY, GASH, MORLEY, and HARTINGER were acting under the color of law and pretense of the statutes, ordinances, customs, regulations, and usages of Defendants CITY AND COUNTY OF SAN FRANCISCO and SAN FRANCISCO POLICE COMMISSION under the authority of their respective offices – Chief of Police, Director of the Office of Citizen Complaints, Investigator in the Office of Citizen Complaints, Attorney for the San Francisco Police Department, and Attorney for the City Attorney's Office of the City and County of San Francisco.

THE GEORGE SMOOT HOMICIDE

15. On November 28, 1987, at approximately 8:00 p.m., the San Francisco Police Department received a call concerning a stabbing incident. General Works Inspectors Kidd and Casillas were dispatched to the scene. Officers responding to the scene found a victim, George Smoot, suffering from a single stab wound to the chest.

16. At approximately 10:00 that same evening, George Smoot died of his injuries. At that point, the case was officially termed a homicide, and investigation was transferred to the Homicide Department of the San Francisco Police Department. In response, Homicide Inspectors Marvin Dean and Plaintiff FRANK McCOY were assigned to the case.

17. Inspector Dean responded to the scene of the homicide. Plaintiff McCOY responded to the Hall of Justice to prepare for a suspect interview. Plaintiff McCOY never went to the scene of the homicide on the day of the stabbing.

18. Later that evening, Kali Smith, a juvenile, was transported to the Hall of Justice for questioning as a suspect to the homicide. During an interview with Plaintiff McCOY, Smith confessed to stabbing George Smoot.

19. On January 7, 1988, a formal petition was filed in juvenile court charging Kali Smith with violations of California Penal Code §§ 192(a), 12022(b), and 12020(a).

20. On February 23, 1988, trial began in Juvenile Court, and on February 24, 1988, the court issued a finding of guilt for violations of Penal Code sections 192(a) and 12022(b).

PUBLICITY AND COMMUNITY PRESSURE

21. Following the homicide, and during the criminal proceedings initiated against juvenile Kali Smith, a number of articles were printed and published concerning George Smoot, and various community groups began to exert pressure on the San Francisco Police Department. These pressures centered on the investigation of the Smoot homicide.

22. On February 21, 1988, just two days before the Smith trial was to begin, San Francisco Examiner reporter David Kirp published a six-page article in the Examiner's "Image" magazine, focusing on a perceived community concern that George Smoot's homosexuality may have

lead the police department to conduct a biased and incomplete investigation.

23. On March 11, 1988, Randy Schell of the Community United Against Violence (hereinafter "CUAV"), wrote Lieutenant McCarthy (who was in overall charge of the homicide investigation), referring to a meeting that Schell had attended that same day with Defendant JORDAN and others, concerning the Smoot homicide investigation. In that letter, Schell urged the Homicide Detail to provide information about the investigation at a community forum planned for March 17, 1988.

24. On March 12, 1988, Bill Paul, president of the Stonewall Gay Democratic Club, published an article citing what he believed were flawed and biased police investigative tactics; Paul's article contained inaccuracies.

CHIEF JORDAN's RESPONSE

25. On March 14, 1988, Lieutenant McCarthy ordered Plaintiff McCOY to prepare answers to several handwritten questions propounded by Chief JORDAN. The questions were in response to the questions raised in the aforementioned articles and meetings. The answers to these questions were to be provided to the various community groups and individuals questioning the still ongoing homicide investigation. The questions focused on facts and evidence concerning the case.

26. At the time Plaintiff McCOY was ordered to answer the questions, the Smoot homicide case was still active. While Smith had been convicted on February 24,

1988, he had not yet been sentenced, and time was still available for the defense to bring a new trial motion.

27. Plaintiff McCOY pointed out the impropriety in responding to these questions. McCOY correctly stated that it would be illegal to provide information concerning the criminal investigation of a juvenile, if that information were to be made available to members of the public. Lieutenant McCarthy agreed, but explained that he was under orders from Chief JORDAN. McCOY was ordered to answer the questions in writing, to keep no copies, and to deliver a redacted police report to the Community Relations Office.

28. On or after March 14, 1988, McCOY provided typed answers to Lieutenant McCarthy as ordered. These answers provided details of the homicide investigation and Inspector McCOY's role in the investigation, and were all provided prior to the filing of any complaint against Inspector McCOY with the OCC. McCOY also included with his answers a copy of the appropriate California Welfare and Institute Code Section which provided that any disclosure about the investigation to persons outside of law enforcement was unlawful.

THE FIRST OCC COMPLAINT

29. On April 28, 1988, the Stonewall Gay Democratic Club and the Alice B. Toklas Lesbian And Gay Democratic Club filed a complaint ("*McCOY I*") with the Defendant OFFICE OF CITIZEN COMPLAINTS. In sum, the complaint alleged "neglect of duty" against Inspector Marvin Dean and Plaintiff Inspector FRANK McCOY and "other unidentified officers." The complaint was signed

by Bill Paul as the "contact person" for complainants Stonewall Gay Democratic Club and the Alice B. Toklas Lesbian And Gay Democratic Club. The allegations in the complaint against Inspector McCoy and other police officers were all based on the conduct of the police at the homicide scene on the night and early morning hours of November 28 and November 29, 1987, notwithstanding the fact that McCOY was not present at the scene at that time.

30. Investigation of the charges contained in the *McCOY I* Complaint was assigned to LAWRENCE SHOCKEY.

31. Although SHOCKEY was responsible for investigating the homicide investigation, thereby rendering career-affecting judgments against McCOY and Dean, SHOCKEY had never investigated a homicide himself, did not know proper law enforcement techniques involved in a homicide investigation, and could not give proper legal definitions of various homicide charges. Plaintiff McCOY is informed and thereon believes that Defendant CITY AND COUNTY OF SAN FRANCISCO generally, and Defendants SAN FRANCISCO POLICE COMMISSION, THE OFFICE OF CITIZENS COMPLAINTS, MICHAEL LANGER and DANIEL SILVA specifically, knew of SHOCKEY's lack of training for the investigation.

32. Defendant SAN FRANCISCO POLICE COMMISSION had a duty pursuant to San Francisco Charter § 3.530-2 to supervise and train the OCC and its staff. It was obligated to train investigators to identify the proper law enforcement techniques involved in all investigations

including homicide investigations; further, it was obligated to establish procedures ensuring the selection of only qualified investigators. The Defendant OFFICE OF CITIZENS COMPLAINTS bore that same obligation.

33. On June 9, 1988 LAWRENCE SHOCKEY interviewed Inspector FRANK McCOY in *McCOY I*. Shockey's interview came one day after Inspector McCOY was interviewed by Barbara Attard, also an OCC investigator, in connection with the second complaint filed against McCOY in this matter, as described below.

34. On July 1, 1988, OFFICE OF CITIZEN COMPLAINTS issued its report to Chief JORDAN. The report sustained three of four charges of misconduct contained in the *McCOY I* complaint. The report, replete with inaccuracies all of which where directed to damage McCOY, was written by Defendant SHOCKEY and approved by Defendants LANGER and SILVA.

35. At Chief JORDAN's order the San Francisco Police Department's Management Control Division ("MCD") reviewed the OCC report and investigated the allegations against Inspector McCOY. After investigation the MCD recommended that no charges be sustained against McCOY. Chief JORDAN neither reviewed, compared nor examined the MCD findings or evidence in conjunction with those of the OCC, and thereafter charged Inspector McCOY and others based upon the OCC's erroneous report.

36. On September 7, 1988, well over three months after the OCC had issued its report, Chief JORDAN charged Inspector McCOY with two violations of General Order D-1, Rule A-9, which provides as follows:

> "Any breach of the peace, neglect of duty, misconduct or any conduct on the part of any member either within or without the state which tends to subvert the good order, efficiency or discipline of the department or which reflects discredit upon the department or any member thereof or that is prejudicial to the efficiency and discipline of the department, though such offenses are not specifically defined or laid down in these Rules and Procedures shall be considered unofficer-like conduct triable and punishable by the board."

37. Plaintiff McCOY and the other investigators were charged before the Police Commission. Hearings were held through all of 1989.

38. On January 3, 1990, the Police Commission, in its initial oral ruling, dismissed all charges against Plaintiff McCOY and the other officers, ruling that:

> "The evidence presented does not support the charges and therefore the charges are unanimously dismissed."

39. The Commission issued its final written decision dismissing the charges on January 22, 1990.

THE SECOND OCC COMPLAINT

40. As previously alleged, substantial publicity surrounded the Smoot homicide investigation during the pendency of the Juvenile Court criminal action against Kali Smith.

41. Allegations and statements made in the aforementioned publicity were all made part of the homicide file, since the case against Kali Smith was still open.

42. Many of the statements made in the articles published were either incorrect or inconsistent with previous statements made concerning the homicide investigation.

43. Because these claims and allegations of improper investigation were now part of the homicide file, and especially in light of the recently filed motion for new trial, Plaintiff McCOY was duty-bound to investigate the nature of the claims.

44. On May 17, 1988, Plaintiff McCOY telephoned Bill Paul, the point of contact and signatory of the McCOY I Complaint, and author of many of the inaccurate articles which were critical of the homicide investigation.

45. Although Plaintiff McCOY had many questions he wished to ask Mr. Paul, Mr. Paul's responses were non-responsive and evasive. In fact, the only question Paul ever directly answered was that he had no complaint against McCOY's investigation or his conduct.

46. Because Paul was a potential witness in the homicide case, at least as far as the new trial motion went, McCOY taped the telephone interview. Paul's role as a witness was evident because Paul's articles falsely described the police investigators as misconducting the investigation and accused Inspector McCOY and other investigators of misconduct and malfeasance in regards witness interviews and other matters, thus subjecting the investigation to potential impeachment.

47. Immediately following the telephone interview, Plaintiff McCOY advised Lieutenant McCarthy. McCarthy

did not complain of nor criticize McCOY's conduct in making the call.

48. Plaintiff McCOY then telephoned defendant SILVA, Chief Investigator at the Office of Citizen Complaints. When McCOY offered to let SILVA listen to the tape of the interview, SILVA refused, stating that "he [SILVA] didn't want to know about it and . . . didn't want to hear about it." SILVA later aided and abetted the unauthorized disclosure of the confidential OCC report in *McCOY I* to the public in an attempt to harm plaintiff McCOY's credibility.

49. Later that same afternoon of May 17, 1988, Plaintiff McCOY telephoned Jay Newquist, a free-lance reporter who authored an inaccurate article concerning the Smoot homicide. Like the conversation with Bill Paul, the telephone interview was recorded and documented in the homicide file.

50. Tapes of the telephone interviews of Mr. Paul and Mr. Newquist were turned over to the District Attorney's Office for possible use to remedy any potential harm to the homicide case caused by the extensive, and erroneous publicity surrounding the investigation and the conduct of the investigators.

51. At the time these telephone interviews were made, there was no rule, regulation or order prohibiting such interviews. In fact, the San Francisco Police Department had and has a custom and practice of routine contact with the media concerning statements made in ongoing investigations.

52. The day after the interviews, on May 18, 1988, Bill Paul telephoned Jay Newquist to discuss the interview. That same day, Paul and Newquist each filed new complaints (*"McCOY II"*) with the OCC.

53. On May 19, 1988, the *McCOY II* complaints were supplemented by correspondence from JOHN CREW, counsel for Bill Paul, to SILVA.

54. On June 8, 1988 OCC investigator Barbara Attard first interviewed Inspector McCoy in *McCoy II.*

55. On October 14, 1988, the OCC notified Plaintiff McCOY that the Complaint in *McCoy II* had been sustained.

56. Over three months later, on January 17, 1989, the San Francisco Police Department, by and through Chief FRANK JORDAN, served notice of its intention to impose up to a 10-day suspension for six violations of General Order L-1, Rule 1-B and General Order D-1, Rule A-9 in *McCOY II.*

57. Hearings on *McCoy II* were held before Chief JORDAN, and began on March 28, 1989. Bill Paul died before cross-examination could be completed. The hearing resumed on June 1, 1989, and was submitted for decision on the same day.

58. Over eight months later, on February 14, 1990, after McCOY was exonerated on *McCOY I* Defendant JORDAN issued written findings that McCOY's conduct in *McCOY II* the aforementioned telephone calls violated General Order D-1, Rule A-9, and issued McCOY a two-day suspension.

59. McCOY exercised his right to review this suspension to the Police Commission. Hearings on that matter began on May 7, 1990, and were continued to June 5, 1990, and then to August 29, 1990.

60. On August 29, 1990, the Police Commission orally sustained the two-day suspension imposed by Defendant JORDAN.

61. On September 13, 1990, the San Francisco Police Commission issued its final written decision in McCoy II, which written decision set forth findings and reasons for McCOY's suspension. Pursuant to the express terms of said written decision, Inspection McCOY was ordered to serve the suspension on November 28th and November 29th, 1990. The Commission's September 13, 1990 written decision was the first time dates were set for McCOY's suspension. A true and correct copy of the said written decision is attached hereto as Exhibit A.

62. Between September 4, 1990 and September 13, 1990 (the final written decision of the Police Commission), the San Francisco Police Department's prosecutor submitted an unnoticed and unauthorized ex parte communication to the Commission containing proposed findings of fact that were written to harm Inspector McCOY. These proposed findings of facts were never served on Inspector McCOY or counsel, and were first discovered at a later time, during McCOY's preparation of his Writ of Administrative Mandamus filed before the San Francisco Superior Court in connection with these proceedings. The Commission had never requested either party nor notified either party to submit findings or any proposed

statement of decision. The submission of the proposed findings of facts were kept secret from Inspector McCOY.

63. Between September 4, 1990 and September 13, 1990, the San Francisco Police Commission received the ex parte communication described above and concealed and failed to notify Inspector McCOY of its presence or use.

64. On or about December 11, 1991, rather than admit any wrongdoing on behalf of the City or its agents, the City filed an opposition to the Writ of Administrative Mandamus filed by McCoy in the San Francisco Superior Court, and the City continues to fail to admit any wrongdoing which had caused harm to McCOY.

65. Plaintiff McCOY served his two day suspension on November 28, 1990 and November 29, 1990.

66. As a result of the suspension, significant promotional opportunities were either denied, seriously harmed, or are no longer available to Plaintiff McCOY, and this damage continues to date because the findings and conclusions adopted by the Police Commission are in the personnel file of McCOY. In addition, this harm continues because it damages McCOY's reputation, thus fulfilling the goal of both *McCOY I* and *MCCOY II* which was to harm the reputation and good name of McCOY as an investigator.

THE DISCOVERY CONCEALMENT

67. The Petition for Writ of Administrative Mandamus filed by McCOY, as mentioned above, has been decided by San Francisco Superior Court adversely to

Inspector McCOY. This Writ challenged the wrongful, unconstitutional, and retaliatory conduct of the defendant conspirators, and the hearings which were conducted absent evidence that should have been disclosed. The adverse Writ of Mandamus ruling will be appealed.

68. In order to adequately prepare to defend the charges levied against him in *McCOY I*, Plaintiff McCOY initiated a request for discovery from the San Francisco Police Department. The request was served on or about January 25, 1989, upon Defendant MICHAEL GASH, counsel for the San Francisco Police Department.

69. On or about February 23, 1989, Mr. GASH replied. His reply was non-responsive to the request of the Plaintiff, and continued the City and County's refusal to provide all necessary material information to the plaintiff.

70. In March, 1989, Plaintiff McCOY subpoenaed the OFFICE OF CITIZEN COMPLAINTS and the San Francisco Police Department for records to be produced at the Police Commission hearings which were to begin on March 15, 1989.

71. On March 15, 1989, Defendant OFFICE OF CITIZEN COMPLAINTS, and the San Francisco Police Department, declined to produce documents.

72. Defendant OCC, through its counsel Defendant Deputy City Attorney MARIAM MORLEY, informed the Police Commission that any documents the OCC might have were irrelevant and need not be produced. Defendant MORLEY also informed the Police Commission that it was without authority to enforce the subpoenas issued.

73. At that same hearing, Defendant GASH stated that there were no other documents in the Police Department's possession.

74. Plaintiff McCOY was forced to initiate other court proceedings in order to receive the required documents.

75. During these various proceedings, Defendants GASH, MORLEY, HARTINGER, SHOCKEY, and LANGER continued to represent in various sworn declarations before Federal and State courts, as well as before the Police Commission, that no additional documents existed. This was untrue.

76. On June 14, 1989, well after the Commission hearings had begun in the case against Plaintiff McCOY, the SAN FRANCISCO POLICE DEPARTMENT and THE OFFICE OF CITIZEN'S COMPLAINTS finally disclosed over 110 pages of Defendant SHOCKEY's notes and other supporting documents. These documents included written statements taken from witnesses and listed persons contacted by the OCC investigation. A review of Defendant SHOCKEY's notes revealed that much of the information in these documents was not included in the initial report filed by the OCC charging Plaintiff McCOY with misconduct.

77. The effect of this late disclosure of hidden material was underscored in October, 1989, when Defendant SHOCKEY testified under oath to the Police Commission that the 110 pages of notes and statements had been in the OCC investigative file during the time Defendants GASH, MORLEY, HARTINGER, and LANGER were making sworn representations that these documents did not

exist or were irrelevant. Throughout these proceedings the San Francisco Police Department refused, and continues to refuse, to produce the written statement of McCOY which was written before he was charged and which contained exculpatory information. This document was the statement ("McCOY Statement") alleged above in paragraph 28 that McCOY was admonished not to duplicate. The San Francisco Police Department also falsely denied the existence of the statement.

78. During the entirety of *McCOY I* and through *McCOY II* the department has concealed and continues to conceal, including to the very date of the filing of the Complaint, the McCOY Statement. That concealment continues each date through the present date. The City's failure to reveal this document continues to deny McCOY a fair defense, including with respect to the Writ of Administrative Mandamus and appeal therefrom. Throughout these proceedings, Defendants CITY AND COUNTY OF SAN FRANCISCO, SAN FRANCISCO POLICE COMMISSION, OFFICE OF CITIZEN COMPLAINTS, JORDAN, LANGER, GASH, MORLEY, HARTINGER, SHOCKEY, and SILVA had a duty articulated in San Francisco Charter § 8.343 to grant Plaintiff McCOY a fair hearing.

79. Moreover, Defendant SAN FRANCISCO POLICE COMMISSION and THE OFFICE OF CITIZEN COMPLAINTS had an affirmative obligation to train and supervise the OCC and its staff to comply with confidentiality requirements pertaining to reports and investigations. The SAN FRANCISCO POLICE COMMISSION was also responsible for establishing policies and procedures

ensuring that the OCC and its staff conducted investigations fairly by complying with document production requests.

CHARGING ALLEGATIONS

COUNT ONE

(Unconstitutionally Inadequate Investigation)

80. Plaintiff FRANK McCOY is informed and believes and thereon alleges that at all times mentioned, Defendants CITY AND COUNTY OF SAN FRANCISCO, SAN FRANCISCO POLICE COMMISSION, OFFICE OF CITIZEN COMPLAINTS, MICHAEL A. LANGER, LAWRENCE SHOCKEY, and DANIEL SILVA with deliberate indifference, gross negligence, and/or reckless disregard for the Constitutional and statutory rights of Plaintiff, maintained, enforced, tolerated, permitted, acquiesced in or applied policies or practices consisting of the following:

a. Selecting, retaining and assigning investigators to OFFICE OF CITIZEN COMPLAINTS with demonstrable propensities for bias, prejudice, and other misconduct that enabled such investigators to violate and continue to violate the Constitutional rights of individual peace officers being investigated;

b. Failing to adequately train, supervise, and control investigators in OFFICE OF CITIZEN COMPLAINTS in the investigative techniques and procedures used by peace officers of the San Francisco Police Department;

c. Failing to adequately investigate incidents involving faulty or incomplete investigations conducted by investigators of OFFICE OF CITIZEN COMPLAINTS;

d. Conducting investigations, and releasing results of those investigations, in such a manner as to conceal the misconduct and incompetence of investigators of OFFICE OF CITIZEN COMPLAINTS, including but not limited to the assignment of Defendant LAWRENCE SHOCKEY, an individual with neither training nor demonstrated ability, to investigate the propriety of a homicide investigation;

e. Failing to adequately train, instruct and supervise members of the OCC on the proper methods of collecting, preserving, maintaining and presenting evidence for reports and hearings; as well as failing to train and supervise OCC employees regarding the confidentiality and accuracy requirements pertaining to OCC investigations, reports, and all oral and written communications regarding these matters; and

f. Condoning and encouraging investigators such as LAWRENCE SHOCKEY and DANIEL SILVA to engage in improper and incompetent investigations for OFFICE OF CITIZEN COMPLAINTS by, among other things, rewarding investigators with promotions.

81. In performing, or failing to perform, the aforementioned acts, Defendants MICHAEL A. LANGER, LAWRENCE SHOCKEY, and DANIEL SILVA acted maliciously and willfully.

82. As a direct and proximate result of the described unlawful and malicious acts of Defendants, all committed

under the color of law, Plaintiff FRANK McCOY suffered damages in violation of his rights under the laws and Constitution of the United States, in particular the Fifth and Fourteenth Amendments thereof, and 42 U.S.C. § 1983.

COUNT TWO

(Unconstitutional Disciplinary Action)

83. Plaintiff FRANK McCOY incorporates and realleges herein the allegations of paragraphs 1 through 79 of this Complaint.

84. Plaintiff FRANK McCOY is informed and believes and thereon alleges that, at all times herein mentioned, Defendants CITY AND COUNTY OF SAN FRANCISCO and FRANK JORDAN, with deliberate indifference, gross negligence, and/or reckless disregard for the Constitutional and statutory rights of Plaintiff, maintained, enforced, tolerated, permitted, and acquiesced in policies or practices including the following:

a. Ordering Plaintiff FRANK McCOY to turn over confidential information for the purpose of its unlawful disclosure, thereby potentially harming an ongoing homicide investigation. The subsequent prosecution of misconduct claims against Plaintiff McCOY were in part based on McCOY's resistance to this illegitimate request. These actions represented retaliatory conduct by Defendant FRANK JORDAN, who, as Chief of Police, was the final policymaker for Defendant CITY AND COUNTY OF SAN FRANCISCO.

85. Defendant FRANK JORDAN, with deliberate indifference, gross negligence, and/or reckless disregard for the Constitutional rights of Plaintiff, proffered charges against Plaintiff McCOY for misconduct, relying upon and adopting the findings of OFFICE OF CITIZEN COMPLAINTS, when JORDAN knew that the investigation of the charges of misconduct were at best flawed and the result of an incomplete and incompetent investigation. In proffering these charges, Defendant JORDAN acted maliciously and willfully.

86. Defendant JORDAN's prosecution of the complaints of misconduct were in bad faith and violated Plaintiff's Constitutional rights of due process under the Fifth and Fourteenth Amendments to the Constitution of the United States, resulting in a violation of 42 U.S.C. § 1983.

COUNT THREE

(Due Process Violations)

87. Plaintiff FRANK McCOY incorporates and realleges herein the allegations of paragraphs 1 through 82 of this Complaint.

88. Defendants MICHAEL GASH, MARIAM MORLEY, and ARTHUR HARTINGER made inconsistent and incorrect statements of law and fact under oath to this Court, the San Francisco Police Commission, and to the Superior Court of the City and County of San Francisco, concerning the discovery dispute alleged in paragraphs 67 through 79 herein.

89. In making these incorrect and inconsistent statements both under oath and as officers of the Court not under oath, Defendants MORLEY, GASH, and HARTINGER were directly responsible of the concealment and the destruction of documents which were subject to disclosure during discovery in the prosecution's case against Plaintiff McCOY in *McCOY I* and *McCOY II*.

90. Such conduct represented an abuse of the powers entrusted to Defendants GASH, MORLEY, and HARTINGER and reflect bad faith in the course of proceedings against Plaintiff McCOY.

91. As a direct and proximate result of Defendants MORLEY, GASH, and HARTINGER's misconduct, Plaintiff McCOY was deprived of his right to due process, generally, and to a fair adjudication of the misconduct claims specifically, in derogation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

COUNT FOUR

(Conspiracy)

92. Plaintiff McCOY incorporates and realleges the allegations contained in paragraphs 1 through 91.

93. From 1988 to the present date, all named Defendants and others presently unknown to Plaintiff McCOY agreed and conspired to associate and combine for purposes of bringing misconduct charges against and to punish and harm Plaintiff McCOY by any means, both lawful and unlawful.

94. Through correspondence, discussions, and other communications, it was agreed between these named and unnamed defendants, that third party Complaints would be improperly investigated, prosecuted, and developed so that Plaintiff would be improperly and unlawfully exposed to a hearing before the San Francisco Police Commissioner without adequate information to defend himself, and the OFFICE OF CITIZEN COMPLAINTS and THE CITY AND COUNTY OF SAN FRANCISCO would subsequently proffer charges against Plaintiff McCOY even though said charges were not valid and internal management documents concluded that no misconduct chargeable to McCOY had occurred.

95. In supporting the investigation, filing, and prosecution of these complaints before the San Francisco Police Commission in *McCOY I* and *McCOY II*, all named defendants concealed material evidence favorable to the plaintiff and manufactured false evidence to charge McCOY. This concealment led to Plaintiff McCOY's suspension from duty on November 28 and November 29, 1990. The existence in McCOY's personnel record of these wrongful disciplinary results creates the continued harm to his reputation and career. This concealment of exculpatory and favorable information by the City defendants continues to this date, and denies McCOY the right to reestablish his reputation and to clear his name and his personnel record.

96. In so conspiring against Plaintiff McCOY, all named Defendants acted maliciously and willfully.

97. As a direct and proximate result of Defendants' conspiracy, Plaintiff McCOY throughout both *McCOY I*

and *McCOY II* was deprived of his right to due process in derogation of the Fourteenth Amendment to the Constitution of the United States.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff FRANK McCOY claims judgment against the Defendants and each of them, jointly and severally, as follows:

1. Compensatory damages in an amount to be determined;

2. Punitive damages against all individual Defendants in an amount to be determined;

3. Costs and attorney's fees pursuant to 42 U.S.C. § 1988; and

4. Any other such relief as this court shall determine to be fair and equitable.

DATED: April 21, 1992

ROPERS, MAJESKI, KOHN,
BENTLEY, WAGNER & KANE

By: /s/ Adrian G. Driscoll
ADRIAN G. DRISCOLL
Attorneys for Plaintiff
McCOY

OFFICE OF
(SEAL) THE POLICE COMMISSION
CITY AND COUNTY OF SAN FRANCISCO
HALL OF JUSTICE
850 BRYANT STREET
SAN FRANCISCO, CA 94103

LOUIS J. GIRAUDO, PRESIDENT
JOHN W. KEKER, VICE PRESIDENT LIEUTENANT
PIUS LEE, COMMISSIONER WILLIE E. FRAZIER
GWENN CRAIG, COMMISSIONER SECRETARY
EDWARD J. CAMPANA, COMMISSIONER

September 13, 1990

W/5844M

Honorable Civil Service Commission
City Hall, Room 151
San Francisco, CA 94102

Employees' Retirement System
1155 Market Street
San Francisco, CA 94103

Dear Ladies and Gentlemen:

At a meeting of the Police Commission on Wednesday, August 29, 1990, the following proceeding was held:

APPEAL OF THE CHIEF'S SUSPENSION IMPOSED ON POLICE INSPECTOR FRANK McCOY, HOMICIDE SECTION

The decision on the appeal of the Chief's suspension imposed on Police Inspector Frank McCoy, Homicide Section, was called, it having been continued from the meeting of August 22, 1990.

Mr. Jerry Akins, Attorney at Law, appeared on behalf of the San Francisco Police Department.

Police Inspector Frank McCoy appeared in person and was represented by Mr. James Lassart, Attorney at Law. Mr. James Lassart made a motion to dismiss the charges made against Inspector Frank McCoy.

Mr. Jerry Akins made a closing statement for the Prosecution.

Mr. James Lassart made a closing statement for the Defense.

All Commissioners acknowledged reading the transcripts of proceedings on the evidentiary hearings and listening to tapes of evidence presented.

Pursuant to the rules of the Commission, Commissioner Keker ruled on the motions made by the accused officer. The motion to dismiss the charges on res judicata and collateral estoppel grounds was denied; the motion to dismiss on First Amendment grounds was denied as to OCC complainant Bill Paul, and granted as to journalist Jay Newquist.

The Commission took the matter under submission, recessed and returned, and the following resolution was adopted:

RESOLUTION NO. 645-90

DECISION ON THE APPEAL OF THE CHIEF'S SUSPENSION IMPOSED ON INSPECTOR FRANK McCOY

WHEREAS, on June 1, 1989, the Chief's Disciplinary Hearing was concluded to determine whether Inspector Frank McCoy should be suspended from his duties as an inspector for engaging in conduct which constitutes violations of Rule I-B of General Order L-1 and Rule A-9 of

General Order D-1 of the San Francisco Police Department; and

WHEREAS, after considering the evidence, argument and discussion at the hearing and further written arguments submitted by Inspector McCoy's counsel, it was found that the accused has engaged in the following conduct, which constitutes violation of Rule A-9 of General Order D-1 of the San Francisco Police Department; and

WHEREAS, on May 17, 1988, Inspector McCoy made a phone call to OCC complainant Bill Paul and a separate call to Jay Newquist concerning a complaint being investigated by the OCC. Although not intimidating in tone of voice, the questions asked by the accused to Paul and Newquist concerned a complaint made to OCC about the conduct of a homicide investigation. The focus of both calls was on the complaint and not for the purpose of gathering evidence for the homicide case; and

WHEREAS, by contacting Mr. Paul and Mr. Newquist and questioning them about an OCC complaint, Inspector McCoy undermined the public confidence in the independent process of citizen complaint investigations, and

WHEREAS, the accused's conduct in this matter violates Rule A-9 of General D-1, which states:

> "Any breach of the peace, neglect of duty, misconduct or any conduct on the part of any member either within or without the state which tends to subvert the good order efficiency or discipline of the department or which reflects discredit upon the department or any member thereof or that is prejudicial to the efficiency and

discipline of the department, though such offenses are not specifically defined or laid down in these Rules and Procedures shall be considered unofficer-like conduct triable and punishable by the Board."

and

WHEREAS, pursuant to Section 8.343 of the Charter of the City and County of San Francisco, the Chief of Police suspended Inspector McCoy from his duties as an inspector for two (2) days; and

WHEREAS, the Commission unanimously finds that the findings of the Chief supporting the two-day suspension imposed on Inspector Frank McCoy are sustained by a preponderance of evidence presented; therefore be it

RESOLVED, that based on these findings consistent with the Commission's duty to protect the health, safety and general welfare of the citizens of the City and County of San Francisco and the public in general, and in order to promote efficiency and good discipline in the San Francisco Police Department, the Commission sustains the two-day suspension imposed on Inspector Frank McCoy by the Chief of Police. Said suspension shall commence on Wednesday, November 28, 1990 at 0001 hours and end Thursday, November 29, 1990 at 2400 hours.

AYES: Commissioners Campana, Craig, Giraudo, Keker, Lee

Recess taken during the hearing of Inspector McCoy:

9:24 p.m. to 9:45 p.m.

(The entire proceedings were taken in shorthand form by Ms. Linda Pransky, CSR.

Very truly yours,

/s/ Willie E. Frazier
Lieutenant Willie E. Frazier
Secretary
THE POLICE COMMISSION

942/fs

cc: Attorney J. Akins, Management Control Division, Personnel, Payroll, Lt. G. McCarthy/Homicide Section [Illegible].

APPENDIX O

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FRANK McCOY,

Plaintiff,

No. C-91-2856-SC

vs.

THE CITY AND COUNTY OF SAN FRANCISCO, et al.,

Defendants.

_____ /

DEPOSITION OF LARRY R. SHOCKEY

Taken before VALLERY M. MILLER

CSR No. 7051

Certified Shorthand Reporter

State of California

September 27, 1994

* * *

[p. 68] A. No.

Q. Did you ever take the position with the San Francisco Police Department in any form of a meeting that Inspector McCoy did an inadequate investigation in the matter because Mr. Smoot was a gay man?

A. Not that I recall.

Q. Did you ever have a meeting with the San Francisco Police Department Chief of Police or any members wherein your view was expressed that Inspector McCoy did an inadequate investigation because Mr. Smoot was a gay man?

A. Not that I recall specifically, no.

Q. Was there ever a meeting that you recall with the San Francisco Police Department that you attended when the issue of whether or not the allegation of there being that Inspector McCoy engaged in homophobic conduct in his investigation was discussed?

A. Not that I specifically recall, no.

Q. Did you make – did you find that in this investigation Inspector McCoy engaged in homophobic conduct in the investigation of Mr. Smoot's homicide?

A. No.

Q. Did anyone within the Office of Citizen Complaints ever tell you it was their belief that [p. 69] Inspector McCoy engaged in homophobic conduct during the course of the investigation of the Smoot homicide?

A. Yeah, I think so.

Q. Who?

A. And – and I'd like to back up just a – just a brief minute on the last question.

And I'd say that in response to your question as to whether or not I found that Inspector McCoy engaged in any homophobic conduct –

Q. In the investigation of the Smoot homicide?

A. Right.

I would say that my answer to that would be yes, but there's two elements to homophobic conduct.

One is internal and one is external. And I stated very clearly in my report that I did not believe that any inspectors engaged in any overtly homophobic conduct during the course of the investigation.

Q. Who else told you that they thought Inspector McCoy engaged in homophobic conduct in the Office of Citizen Complaints?

A. We discussed the investigation between Dan Silva and Mike Langer and myself, generally, and [p. 70] so those elements regarding those specific allegations would have been discussed with those two people.

Q. So yourself and Langer and Silva discussed the issue of whether or not Inspector McCoy engaged in homophobic conduct during the course of the investigation of the Smoot homicide came up in discussion between the three of you?

A. Yes.

Q. Did Mr. Silva think that Inspector McCoy engaged in homophobic conduct?

A. Yeah, I don't know what he thought.

Q. Did he tell you what he thought?

A. He agreed with the findings of the report. So I can only conclude that – that he must have thought that there were some.

Q. And Mr. Langer, did he tell you he agreed that Inspector McCoy engaged in some homophobic conduct in the investigation of the Smoot homicide?

A. I don't know whether it was ever expressed.

Q. The question is you don't recall him saying that?

A. That's correct.

Q. Did Mr. Silva ever express himself on that subject?

[p. 71] A. I don't believe anybody every said Inspector McCoy engaged in homophobic conduct.

Q. Now you – and you would agree that he didn't engage in external homophobic conduct; is that right?

A. That's correct.

Q. What does that mean?

A. To my mind that calls upon – a lot of times it's name-calling, calling some people a faggot or a queer in some ways; things like that.

Whereas internalized is more carrying out your actions based on a set of stereotypes.

Q. Okay.

A. Whether you may understand that you're doing that or not.

Q. So you're saying that Inspector McCoy engaged in some internal homophobic conduct during the course of the investigation?

A. That's – yeah, I would say that.

Q. What did he do?

A. The one thing – the one thing that stands out is not collecting the pants from the juvenile suspect.

And the reason the [sic] he gave for that –

Q. You thought he engaged in internal homophobic conduct because he didn't collect the [p. 72] juvenile's pants?

And the reason for that –

A. Because the juvenile suspect was there; his parents were present. And to have done so, could have caused the suspect to make allegations against the department which could have been potentially embarrassing.

Q. And you thought that was homophobic conduct?

A. Yes.

Q. The juvenile wasn't – was he a gay juvenile?

A. I don't know.

Q. Any other internal homophobic conduct you thought Inspector McCoy engaged in during the course of the investigation of the Smoot homicide?

A. During the course of the interview of the suspect at the Hall of Justice, there was some discussion about this alleged pass that the victim had allegedly made at the suspect.

Q. Right.

A. And the manner in which it was discussed and the questions which were asked in regard to that, again today, make me believe that there was some – perhaps some internalized homophobia there.

Kind of seemed as though the statement [p. 73] with regard to the pass was kind of accepted as true.

Q. You've been to schools in investigative interrogation, haven't you?

A. That's correct.

Q. In the course of that, did you ever learn that you accept statements of people who are making statements after they've been advised of their rights as an investigative technique so they continue to talk?

A. Yes.

Q. Do you know what Inspector McCoy was doing – what you call internalized homophobic conduct – is an effective interrogation tool?

MR. EMBLIDGE: Well, as phrased, calls for speculation.

MR. LASSART: Q. What do you think?

A. I believe that had Inspector McCoy gone back and followed up on those questions, that it would have – could have been a decent internal investigative tool.

Because there was no follow-up, it seemed there was some homophobia internalized anyway.

Q. I see. Now, up to that point in time, you thought that whole statement was something that couldn't be used in evidence, didn't you?

A. I believe the confession had been

* * *

APPENDIX P

LAW OFFICES OF
BLEY AND BLEY
AN ASSOCIATION INCLUDING
A PROFESSIONAL CORPORATION
335 SACRAMENTO STREET, SUITE 1000
SAN FRANCISCO, CALIFORNIA 94111

January 25, 1989

Michael Gash, Esq.
Police Department – Legal Department
850 Bryant Street, Room 545
San Francisco, CA 94103

Re: Matter of Casillas, Dean, Kidd, and McCoy
Police Commission File Nos. C89-70MEG, 71MEG, 72MEG, 73MEG

Dear Mr. Gash:

Please be advised that I, on behalf of all counsel representing the above named inspectors, am putting forth this letter as a request for discovery for specific documents. This request for production of documents is being made pursuant to the Peace Officer's Bill of Rights, Government Code Section 3300 et seq. California Public Records Act, Government Code Section 6250 et seq., the Information Practices Act of 1977, Civil Code Section 1798 et seq., Labor Code Section 1198.5 and *Johnson v. Winter* 127 Cal. App. 3d 435 (1982). For your convenience, while all counsel on this action are requesting the following documents to be furnished within 25 days from the date of this letter, you may tender one copy of all of the documents to my office. This request is being made pursuant to our client's due process rights under the above-mentioned authority

and so that we may adequately prepare for the hearing date now scheduled for March 15, 1989.

If you are unable to furnish any of the documents listed below, please respond in writing as to why you are unable to do so. The documents requested are:

1. All notes, minutes, tape recordings, or any memorandum made of any meetings or conferences held by OCC staff wherein OCC case number 0489-88 was discussed, or wherein any of the above named inspectors were discussed.

2. All notes, minutes, memoranda, or tape recordings wherein the above named inspectors were discussed or the pending action before the San Francisco Police Commission was discussed by members of Management Control, or in any form of a police departmental meeting, whether Chief Jordan was in attendance or not.

3. All rough drafts of the OCC report case number 0489-88 dated July 1, 1988; all rough drafts of the Management Control report dated August 9, 1988 by Sgt. Pelham C. Wilmerding; and all rough drafts of the report from Captain Thomas Murphy, Lt. Gerald McCarthy and Lt. Richard Hesselroth dated April 7, 1988 and regarding the investigations of these four inspectors. This would include any inter-departmental memoranda prepared by the above-named individuals.

4. All memoranda amongst and/or between the following individuals at OCC regarding any or all of the four

inspectors, or the OCC report number 0489-88 or any of the OCC investigation in or of itself:

a) Michael Langer
b) Daniel Silva
c) Diane Attard
d) Larry Schockey

5. Any letters in the OCC files from any member of the OCC staff to or from John Crew, staff attorney for the American Civil Liberty Union or any member of the OCC staff to William Paul, complainant that mentions, discuss or relates to the OCC investigation in this action or which relates mentions or comments upon any conduct, conversation or action as it affects any of the four above named inspectors;

6. A list of all exhibits and/or photographs the department intends to introduce as evidence at the March 15, 1989 hearing.

7. A list of all departmental witnesses you intend to produce for testimonial evidence at the hearing;

8. Any letters that may have been exchanged between OCC and the commission or OCC and the department and a list of any extra witnesses you intend to also call at the hearing.

Should you have any questions with regard to the above enumerated discovery request please do not hesitate to call me or in the event that you should be unable to produce these document [sic] I would appreciate your

enumeration of which documents you are unable to produce.

Sincerely,

BLEY AND BLEY

/s/ Carole E. Seliger
By Carole E. Seliger

CES/rva

cc: Stephen Bruce Bley
John F. Prentice
James Lassart

CES001.Gash

APPENDIX Q

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FRANK McCOY,

Plaintiff,

No. C-91-2856-SC

vs.

THE CITY AND COUNTY OF SAN FRANCISCO, et al.,

Defendants.

_____ /

DEPOSITION OF MARIAM MORLEY

Taken before RALPH L. CISTARO

CSR No. 2087

Certified Shorthand Reporter

State of California

October 11, 1994

* * *

[p. 13] Q. By "labor" and "personnel," you are talking about the personnel interworkings of the members of the office themselves?

A. Yes, I am.

Q. Now, at any time after you took the position as advisor to the Office of Citizen Complaints, did you ever act as an advisor for the police department itself?

MR. EMBLIDGE: Are you including the Police commission within –

MR. LASSART: I am talking about the department.

THE WITNESS: During the course of my presentation of the OCC, I probably gave advice to the police department.

MR. LASSART: Q. Did you ever give advice to the chief, Frank Jordan, while you were an advisor to the Office of Citizen Complaints?

A. No, I don't think that I did.

Q. Did you ever act as an advisor to the San Francisco Police Commission while you were an advisor to the Office of Citizen Complaints?

A. While I represented the Office of Citizen Complaints or while I advised them, I gave advice to the Police Commission, yes.

Q. At some time while you were advising the [p. 14] Office of Citizen Complaints, did you become familiar with an investigation pertaining to Homicide Inspectors McCoy, Casillas, Dean, and Kidd?

A. I became aware of that.

OCC investigation?

Q. Correct.

A. I became aware of the OCC investigation.

Q. Do you know at what stage of the proceedings you first became aware of the OCC investigation?

A. I can't recall when I became aware of the OCC investigation.

Q. Do you know how you first became aware of it?

A. I cannot remember the context.

Q. Did you ever get an opportunity to review the OCC report which sustained charges against the four homicide inspectors in the Smoot homicide?

A. I have reviewed that report, yes.

Q. Do you know when it was you first reviewed that?

A. I don't remember the date.

Q. Can you give me the circumstance?

A. I believe that the first time I saw the report I believe that it was while – I believe it was sometime after January of 1989.

[p. 15] Q. Do you recall the circumstances of your first viewing of that report?

A. No. I'm not sure of the circumstances on my first viewing of the report, and I'm actually not sure that I viewed it more than once.

Q. Do you know where you were when you first saw it?

A. No.

Q. Do you know who was with you when you first saw it?

A. No.

Q. Do you know why you even looked at it the first time you saw it?

A. I know – I'll tell you I know that I saw the report in connection with the request for documents in the Police Commission proceeding involving the four officers – Dean, Casillas, McCoy, and Kidd. I don't know if that's the only time I looked at it and – . I don't know.

Q. Do you recall, after you became aware of the McCoy matter, that a subpoena was served on the director of your client, the Office of Citizen Complaints?

A. I know that it – that a subpoena was served on the Office of Citizen Complaints.

MR. LASSART: I am going to, at this [p. 16] time, mark as Exhibit 1 to your deposition this particular document.

(Plaintiff's Exhibit 1 was marked for identification.)

MR. LASSART: Q. I have placed before you Exhibit 1, which contains three pages. It is a Police Commission Subpoena Duces Tecum; the second page, which is the back side of that page; and the third page is a request for documents signed by Carole Seliger, dated March 10, 1989.

This subpoena seeks compliance on 15 March 1989.

Now that we have that all in front of you, do you recall being contacted by your client reference the receipt of this subpoena?

A. I don't recall the phone call, no.

Q. Let's put it this way: Do you recall becoming aware that a subpoena had been issued?

A. Yes.

Q. How did you find out?

A. I believe Michael Langer told me.

Q. After you were informed of the service of the subpoena, did you take any action to review the subpoena itself?

A. I believe that I reviewed the subpoena.

Q. What were the circumstances of your [p. 17] review of the subpoena?

A. I'm not sure I understand the question.

Q. Do you know how you got the subpoena?

A. No, I don't recall how I got it.

Q. After you received the subpoena, was advice sought from you by your client?

A. Yes.

Q. Did you review the subpoena to determine whether or not there would be compliance with the subpoena?

MR. EMBLIDGE: Objection: work product. There was ongoing litigation at this time.

I won't instruct the witness not to answer the question as long as you will stipulate that such an answer won't be a general waiver of the work product privilege.

MR. LASSART: Just so you know, there's a representation in open commission that they weren't going to be complying with the subpoena.

MR. EMBLIDGE: But, as phrased, you haven't put that on the record yet.

MR. LASSART: I thought we all remembered.

MR. EMBLIDGE: So stipulated?

MR. LASSART: Sure.

Q. Now, do you remember going into the [p. 18] commission hearing and talking about whether or not the subpoena should be complied with?

A. I remember I went to a commission hearing to talk about the subpoena and talked about the subpoena.

Q. Have you seen a transcript of any of your discussions before the commission before your deposition today?

A. Yes, I have seen that transcript.

Q. When was the last time you saw it?

A. I don't know. Maybe within the last month.

Q. Did that assist you in refreshing your recollection as to what it was that you said during the course of that hearing in reference to the compliance of the subpoena?

A. Yes; somewhat.

Q. Now, the subpoena, as you can see on Exhibit 1, has a compliance date of 15 March 1989; is that correct?

A. Yes.

Q. Do you recall reviewing a transcript of the proceedings before the commission which contains your remarks on the 15th of March of 1989?

A. I have read that transcript.

Q. In reviewing that transcript, are you [p. 19] able to recall now the advice you gave to the commission in reference to the subpoena?

A. I don't know if I could word for word tell you what I said; but if you showed me a copy of the transcript, I guess I could.

Q. Let me ask you this before I do that, and I sure can do that.

I don't want a word for word.

Do you have a recollection, generally, of what you told them?

A. Yes.

Q. Can you give me that?

A. I think I told them that the OCC was not going to turn over documents that were responsive to the subpoena or was not going to turn over documents in response to the subpoena.

Q. When you made that representation in open court – and we're going to call the commission hearing "court," for lack of a shorter term – before the commission, who were you representing?

A. Who was I representing?

Q. Yes.

A. The City and County of San Francisco.

Q. Were you speaking on behalf of the Office of Citizen Complaints, the entity that had received the subpoena?

[p. 20] A. I guess I was telling the commission what the OCC was going to do.

MR. LASSART: Let me mark as Exhibit 2 this particular transcript, dated March 15, 1989. It is a portion of that transcript.

(Plaintiff's Exhibit 2 was marked for identification.)

MR. LASSART: Q. Take your time and just take a look at whatever you want to take a look at of that exhibit.

A. (Witness complies.)

Q. Now that you've had an opportunity to review the transcript, were you there representing the Office of Citizen Complaints in their response to the subpoena?

MR. EMBLIDGE: Asked and answered.

She said she was representing the City and County, but she was responding on behalf of the OCC.

MR. LASSART: She gets to testify.

MR. EMBLIDGE: That's what she did testify to.

MR. LASSART: Q. Go ahead. Were you representing the Office of Citizen Complaints?

A. As I said, I was there representing the City and County of San Francisco.

[p. 21] Q. Who were you responding on behalf of?

A. I was responding on behalf of the OCC.

Q. Were you advising the Police Commission at that time not to turn it over, or were you telling them that your client wasn't going to turn it over?

MR. EMBLIDGE: If either.

THE WITNESS: I think I was responding on behalf of the OCC, and I told the commission that the OCC was respectfully refusing to produce documents.

MR. LASSART: Q. Were you acting as the commission's lawyer in telling them not to require the OCC to turn these documents over?

A. When I told the commission that the OCC wasn't responding – wasn't going to turn over documents pursuant to the subpoena?

Q. Yes.

A. I think I was just telling them that the OCC wasn't going to turn over documents pursuant to the subpoena.

Q. Were you or were you not acting as the commission's attorney, advising them not to require a turnover of the documents?

A. When I came to the meeting, I was representing the City and County of San Francisco, and I responded to the subpoena on behalf of the OCC.

And it appears that during the course of [p. 22] that meeting I was also asked questions by the commissioners

and would have given advice to the commission, also, on that subject.

Q. You say you were representing the City and County of San Francisco.

You had two different agencies who were there in that matter; isn't that right?

A. Well, actually, the police department, under the charter, technically consists of three entities.

The Police Commission manages and operates both the police force, under the police chief – many people, including me, commonly call that the police department – and it also manages the OCC.

So, under the charter, the commission, the chief, and the police force and the OCC are part of the police department.

And I think they were all present that night.

Q. The Police Commission allowed a subpoena to be issued to the Office of Citizen Complaints.

Did you ever take a position that that Police Commission subpoena duces tecum couldn't be enforced against the Office of Citizen Complaints?

A. I believe that during that time I took [p.23] the position that a police – the Police Commission, like any other administrative agency, doesn't have the power to enforce a subpoena or its subpoena; that only a court can enforce a subpoena of an administrative agency.

Q. Were the interests before the commission, between the OCC and the commission, were the interests

adverse at the time you were appearing there on March 15, 1989?

MR. EMBLIDGE: Objection: calls for a legal conclusion.

You can answer.

THE WITNESS: No, I don't believe that there were adverse interests.

MR. LASSART: Q. The Police Commission, at that time, was formed under a charter provision separate than the Office of Citizen Complaints; isn't that correct?

A. The Office of Citizen Complaints does have its own charter provision, but I believe that that charter provision that describes the commission also describes the OCC and the police force under the chief. It describes the police department and then there's probably another charter section that talks about the commission itself.

I'd have to look at the charter, though.

* * *

[p. 25] MR. EMBLIDGE: Again, are you talking about charter language?

MR. LASSART: Correct.

THE WITNESS: I don't know that the charter language that talks about an OCC investigative hearing discusses the OCC's duty to the officers at that hearing.

MR. LASSART: Q. The Office of Citizen Complaints at that time, and even now, does it have the authority to impose discipline on an officer?

A. It does not have the authority to impose discipline on an officer.

Q. Does the Police Commission of the City and County of San Francisco have the authority to impose discipline on a police officer?

A. Yes, it does.

Q. Now, when you were standing before the commission on March 15th of 1989, were you representing the body that could impose the discipline or the investigative agency?

MR. EMBLIDGE: Asked and answered.

I mean you've asked her twice. She's told you the same thing twice.

MR. LASSART: Q. Go ahead.

A. I was representing the City and County of San Francisco.

[p. 26] Q. Were you representing both?

A. I was representing the City and County of San Francisco, and both the Office of Citizen Complaints and the Police Commission are part of the City and County.

Q. Were the police officers and their counsel in an adversarial role to the commission?

A. I don't think so.

Q. Well, were they in an adversarial role with the Office of Citizen Complaints?

A. I don't think so.

And I don't – I don't know what I thought about that on that night, certainly.

Q. On that particular night you represented to the commission that the Office of Citizen Complaints did not have any exculpatory evidence in its possession; is that correct?

A. (No response.)

Q. Let me just call your attention to the second page of the transcript, around Line 14. You can look down from that.

A. Yes.

Q. Had you looked at all of the materials that were in the possession of the Office of Citizen Complaints at the time you made that representation?

A. No.

* * *

[p. 39] an order to order a police officer to appear before the commission.

As an administrative agency, it has no power to enforce; only the court can enforce a subpoena.

MR. LASSART: Q. Is not the subpoena duces tecum with the Police Commission an order of the commission?

A. I don't –

Q. Take a look at the exhibit before you, just above where it says "The Police Commission."

A. "STATE OF CALIFORNIA City and County of San Francisco"?

Q. Down at the bottom it says, "By Order of THE POLICE COMMISSION BY Willie E. Frazier, Secretary."

A. Yes.

Q. So is not the subpoena duces tecum of the Police Commission an order of the Police Commission?

A. I don't know.

Q. Does the Police Commission have the authority to have Michael Langer, as the Office of Citizen Complaints, to do things like turn over files?

A. Yes.

Q. Did you ever advise on the issue of [p. 40] whether or not the Police Commission subpoena is an order of the commission?

A. Did I advise whom?

Q. Anyone on the issue or whether or not the Police Commission subpoena is the order of the Police Commission.

MR. EMBLIDGE: The question he is asking now is did you give advice on that issue.

You can answer that.

THE WITNESS: Not that I know of; not that I recall.

MR. LASSART: Q. Did you advise the Police Commission on March 15th, 1989 that the subpoena, their

own subpoena, was not enforceable against Michael Langer and the Office of Citizen Complaints?

A. Are you talking about on the evening of March 15th?

Q. March 15th, 1989.

A. Are you talking about on the evening of March 15th, 1989 at the commission meeting?

Q. Yes, I am.

MR. EMBLIDGE: He is referring to that paragraph (indicating) on the last page of the exhibit.

THE WITNESS: I advised the Police [p. 41] Commission that they do not have the authority to enforce the subpoena.

MR. LASSART: Q. And the subpoena that you were addressing was the subpoena to the Office of Citizen Complaints, Michael Langer, director; isn't that right?

A. Yes.

Q. Had you advised them earlier in writing in the same manner that you advised them orally in front of the commission on that evening?

A. I had advised them earlier in writing. I don't know if I – if the language was exactly the same. I don't know exactly what my letter said, but I definitely had advised them on that subject.

Q. Do you recall whether or not the Police Commission enforced the subpoena against the Office of Citizen Complaints which was argued on March 15th, 1989?

A. I don't understand the question.

Q. Do you remember what the ruling of the commission was reference the enforceability of the subpoena?

A. I'm not sure I remember that they made a ruling.

MR. LASSART: Let me mark as Exhibit 3 a two-page letter written by yourself to myself on [p. 42] March 29th.

(Plaintiff's Exhibit 3 was marked for identification.)

MR. LASSART: Q. You have before you Exhibit 3, which is a two-page document, which appears to be written by yourself – or a copy of which appears to be written by yourself.

Was this letter written by you?

A. Yes, it was.

Q. The date at the top, March 29, 1989, does that appear to be the date that this letter was written?

A. Yes, it does.

Q. In conjunction with this, did you reiterate that the City Attorney has advised the commission that it had no authority to enforce the subpoenas issued in its quasi-judicial capacity?

A. Yes, I did.

Q. Now, subsequent to this, this particular letter, did there come a time when there was a hearing before the Superior Court on an exculpatory motion pertaining to an injunction?

MR. EMBLIDGE: District Court?

MR. LASSART: District Court.

I am sorry. I apologize.

THE WITNESS: Yes.

[p. 43] Actually, I don't know that there was a hearing.

I know that there was an application and a ruling.

MR. LASSART: I would like to mark at this time this next exhibit in order, please.

(Plaintiff's Exhibit 4 was marked for identification.)

MR. EMBLIDGE: Do you want her to read it word for word?

MR. LASSART: No.

Q. I just want you to take a look at it so you are familiar with it. I can point out areas and you can read them.

You have before you now Exhibit 4, which is marked for the purposes of this deposition.

Do you recognize this as a declaration submitted by yourself in the District Court before Judge Vukasin?

A. Yes.

Q. The file stamp on this is March 30th, 1989, and it appears your declaration was executed on the 30th of March, 1989.

In this declaration, did you represent to the District Court that you represented the Office of Citizen Complaints reference to the subpoena issue?

[p. 44] A. I represented – I told the District Court that I had given the OCC advice in connection with the subpoena.

Q. You told the District Court you were assigned to represent the Office of Citizen Complaints, you're familiar with the plaintiff's claims, and the OCC has refused to comply with the subpoena issued by the Police Commission and that you advised the OCC that the responsive, unproduced documents they have located after searching their files in response to plaintiff's, et cetera.

I'll let you take a look at that.

MR. EMBLIDGE: Well, are you asking her whether she said what this says she said?

MR. LASSART: Q. Let me just let you take a look at that area, and I will ask you about it.

(Short pause.)

MR. LASSART: Q. In conjunction with these representations, had you looked at that time at the file within the OCC?

A. No.

Q. Had you received any additional information before this March 30, 1989 filing from anyone in the Office of Citizen Complaints reference whether or not they had exculpatory documents in [p. 45] their possession reference the disciplinary matter?

MR. EMBLIDGE: When you say "additional information," you mean in addition to the communications that she talked about prior to March 15th?

MR. LASSART: With Mr. Langer.

THE WITNESS: I don't know what I had – I don't know what communications had gone on between me and the Office of Citizen Complaints on this issue. I don't recall the particular conversations.

MR. LASSART: Q. Was it your understanding at the end of March of 1989 that on April 5th, the upcoming hearing, the Office of Citizen Complaints would bring all of the remaining documents in their file to the commission hearing with them?

A. No, I don't think it was.

Q. Did you have an occasion to prepare for the April 5th, 1989 hearing before the commission reference the disclosure of documents that were being sought as a result of the subpoena to your client, the Office of Citizen Complaints?

A. The question is did I have an opportunity to prepare?

Q. For that hearing.

MR. EMBLIDGE: Objection: vague as to [p. 46] "prepare."

MR. LASSART: Q. Well, April 5th of 1989 was to be a date in which you would identify documents in the possession of the Office of Citizen Complaints that were being requested by the inspector defendants; is that right?

A. I don't remember that we were going to identify documents on the 5th. I'm not – I'm not sure about the identifying of documents.

Q. Prior to April 5th, when you walked into the courtroom or the commission room, had you had an opportunity to see what documents the Office of Citizen Complaints had in its possession reference the matter involving the inspectors?

A. Prior to April 5th, I had not reviewed the OCC file or files.

Q. On April 5th, did you review the OCC file or files?

A. No.

Q. On April 5th, when you went into the commission hearing, Mr. Delventhal was there with you?

A. I think he was.

Q. And you both appeared before the commission?

A. Yes.

[p. 47] Q. During the course of that April 5th, 1989 hearing, were there representations made as to how many documents that were in the possession of the Office of Citizen Complaints were responsive to the letter request for discovery and/or identified in the subpoena?

A. Yes, I think so.

Q. Had Mr. Delventhal seen the file of the OCC?

A. No.

Q. And you had not seen the file?

A. No.

Q. There was a representation there was only about five documents at that time before the commission; there were five documents that were responsive to the request by the inspector defendants.

Do you recall that?

A. I think that Mr. Delventhal and/or I said five.

Q. Do you recall whether both of you made the representation that there were five documents?

A. I think we both talked about the documents and the number. I can't remember whether we both said five or one of us said four or five.

Q. Where do you get the number five when you [p. 48] were representing to the commission that there's only about five documents that were in the possession of the OCC?

MR. EMBLIDGE: Same objection as before as to attorney-client communications.

But, again, Jim, I won't instruct her not to answer this if I have the stipulation that you –

MR. LASSART: This question isn't a general waiver.

MR. EMBLIDGE: Right; a waiver as to other conversations on other subjects.

MR. LASSART: Right.

THE WITNESS: Where had I gotten the information –

MR. LASSART: Q. Correct.

MR. EMBLIDGE: That there were only five documents.

THE WITNESS: From my client, the OCC.

MR. LASSART: Q. Generically, it doesn't talk. Who talked to you?

A. I believe Michael Langer, but I'm not certain if it was Michael or not.

Q. Did you talk to him directly, to Mr. Langer directly?

A. About this issue?

APPENDIX R

CITY AND COUNTY OF SAN FRANCISCO

LOUISE H. RENNE
CITY ATTORNEY
CITY HALL

CONFIDENTIAL – ATTORNEY-CLIENT PRIVILEGE

Mariam M. Morley
Deputy City Attorney
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May 31, 1989

President Lou Giraudo
San Francisco Police Commission
850 Bryant Street
San Francisco, CA 94103

Re: Motion for Production of Complaint Work Summary and In Camera Reviw [sic] of Document

Dear President Giraudo:

At last week's commission meeting the charged officers requested a copy of the complete OCC Complaint Work Summary in OCC case no. 0489-88, which led to the current charges against Officers Dean, Kidd, McCoy and Casillas. Although Carole Seliger argued on behalf of the charged officers that they had already requested this document, this is simply not true. As I explained at length at last week's meeting, only certain portions of that document were responsive to the charged officers' January 25, 1989 letter and March 10, 1989 subpeona [sic]. Those portions have been provided to the charged officers.

I have provided Lt. Frazier with 4 complete copies of the Complaint Work Summary for the Commission's

review. As we advised you in our March 30, 1989 letter, in reviewing this document to determine whether it should be disclosed to the charged officers, the Commission should employ a liberal "good cause" standard and provide the officers with the requested document if it is relevant, material, and "will facilitate the ascertainment of the facts and a fair trial." *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 536; *see also Shively v. Stewart* (1966) 65 Cal.2d 475, 479-80; Penal Code §§ 1043 and 1045. We have given this advice, in an effort to be scrupulously fair, although it is arguable that the officers are entitled only to copies of the "materials upon which the action is based. . . . " *Skelly v. State Personnel Board* (1975) 15 Cal.3d 104, 214.

The document requested here, the Complaint Work Summary, is used by the investigator to briefly note the steps taken in investigating the complaint. The Summary constitutes the investigator's working notes. The OCC considers the Complaint Work Summary to be confidential. Rule 606.2 of the Investigative Hearing Rules and Procedures of the Office of Citizen Complaints, adopted by the Police Commission on November 20, 1986, provides, in part, as follows:

> "The Commission deems the following records confidential:
>
> > investigator's notes, opinions, impressions or anything otherwise generally considered to constitute the work product of the investigator developed in the course of the investigation."

The City Attorney has argued in the past, and it is the position of the OCC, that disclosure of the Complaint

Work Summary would impair the ability of the OCC to conduct its investigations. Investigators must be able to candidly and contemporaneously record their impressions without fear that such notes will be later submitted to public view. Disclosure of the Complaint Work Summary to people outside the OCC could detract from aggressive, probing and complete investigations by the OCC.

Unless the Commission is required by due process to disclose the Complaint Work Summary on the ground that it will aid the officers in preparing their defense, the Commission is justified in refusing to disclose the Summary. It is our view that the Summary will not aid the officers in the preparation of their defense. The undisclosed portion of the Summary is, as you will see, generally just a chronological account of the steps taken in completing the investigation. However, as you may also conclude after review of the Summary, disclosure would not, in this case, harm the OCC.

If the Summary is not turned over to the charged officers, the officers may seek further judicial relief. While we do not believe that such a request for judicial relief would be successful, it could delay the Commission's disciplinary proceedings. In addition, even if the charged officers do not seek interim review of the discovery question, the charged officers would certainly raise the denial of these documents as an issue in their attempt to overturn any discipline that is imposed. Again, we do not believe that such a claim would prevail. However, we cannot guarantee that a reviewing court would agree.

In sum, disclosure of the entire Complaint Work Summary is not, in our view, necessary here under due process principles. However, refusal to disclose the Summary will probably cause some disruption of the Commission's proceedings as the charged officers object, request a stay, make a motion for dismissal, or seek judicial intervention. (Of course, if you turn over the Summary the charged officers may seek a continuance so that they have more time to review the document.) Although disclosure of *this* Complaint Work Summary will not harm the OCC in this instance, there is some concern about: (1) similar requests in future cases; 2) the precedent that turning over the Summary might create, and 3) the "chilling effect" disclosure will have on investigators' ability to spontaneously record their impressions. The decision whether to turn over the document lies within the Commission's discretion.

Very truly yours,

LOUISE H. RENNE
City Attorney

BURK E. DELVENTHAL
Deputy City Attorney

/s/ Mariam M. Morley
MARIAM M. MORLEY

APPENDIX S

City and County of San Francisco: **Office of City Attorney**

[SEAL] Louise H. Renne,
City Attorney

PRIVILEGED AND CONFIDENTIAL ATTORNEY/CLIENT COMMUNICATION

Mariam M. Morley
Deputy City Attorney
(415) 554-4263
June 14, 1989

President Lou Giraudo
San Francisco Police Commission
850 Bryant Street
San Francisco, CA 94103

RE: MOTION FOR PRODUCTION OF OCC NOTES RE MANUEL FLOYD AND IN CAMERA REVIEW OF ALL UNPRODUCED DOCUMENTS

Dear President Giraudo:

At last week's Police Commission meeting, the charged officers apparently requested a copy of Larry Shockey's notes of his first interview with Manuel Floyd, which were mentioned in the tape recording of Larry's second interview of Mr. Floyd. Because the tape recorder apparently malfunctioned during the first interview, Larry called Manuel Floyd on the telephone, read the notes of the first interview, and asked whether the statements contained in the notes were accurate. This telephone conversation was tape recorded and that second tape was submitted to Chief Jordan in conjunction with the OCC's report of its investigation. (The notes of the

first interview were not submitted to the Chief.) As is his practice, when charges were filed against the four inspectors, Michael Gash turned over to the charged officers the tape recording and all other materials he had received from the OCC. Thus, the charged officers already have the tape recording of the notes but not the notes themselves.

At last week's Commission meeting, Larry Shockey stated that the notes at issue had probably been destroyed, as such notes are not normally retained by the OCC in the normal course of business. He was mistaken. Although Larry generally destroys his handwritten notes of taped interviews, he did not do so in this case.

We advise you to turn over the Manuel Floyd notes (three pages) to the charged officers pursuant to their request of last week. Because these notes were read *almost* verbatim to Manuel Floyd in the course of the second interview (the tape of which the charged officers received) the notes are redundant, only containing information that the charged officers have already received. Therefore, pursuant to the standard that we have advised you to use in determining whether documents should be produced – whether the documents are relevant, material and will facilitate the ascertainment of the facts and a fair trial – they need not be revealed. However, we see no harm in producing them. The OCC has informed us that release of these notes will not impede them in the discharge of their duties.

During the in camera session held two weeks ago (May 31) to determine whether the entire Complaint Work Summary should be disclosed, I believe that you

asked if there were any more documents. I had to inform you that there were. In other words, Michael Gash initially turned over all documents sent to the Chief of Police by the OCC, but the OCC does not send its entire file to the Chief, it only transmits those materials it relied upon in reaching its conclusion. Subsequently, the City Attorney turned over documents requested of the OCC in the charged officers' January 25, 1989 letter and March 10, 1989 subpoena. Finally, on May 31, the Commission turned over the entire Complaint Work Summary to the charged officers. Thus, we have disclosed: (1) all the documents that the OCC, and subsequently the Chief, relied on in determining that charges were warranted here; and (2) all OCC documents that the charged officers subsequently requested. However, we have not photocopied the entire OCC file and given it to the charged officers.

We anticipate that the charged officers may continue to reques documents on a piecemeal basis throughout this proceeding. To the extent that the OCC holds unproduced documents in its files, the Commission may encounter more delays in the form of additional in camera sessions, requests for dismissal and motions for stay. Therefore, with Larry Shockey's help, I have reviewed all OCC files regarding Case No. 0489-88 (the investigation of the Smoot matter) and pulled all items contained in those files that have not been given to the charged officers.

It is our view that the charged officers have never requested these documents and, in addition, that these documents need not be disclosed under the liberal due process standard, recited above, that we have advised

you to use in determining whether requested documents should be disclosed. Moreover, the law is quite clear that the charged parties in an administrative proceeding have no absolute right to see everything in an agency's file; good cause must be shown. *See Shively v. Stewart* (1966) 65 Cal.2d 475. CEB, *California Administrative Hearing Practice* (1984) § 2.72, p. 108. Here, because the charged officers have not requested the items described below, they have obviously not shown good cause for their production. However, we believe that release of these materials will not adversely affect the OCC in this instance.

The unproduced documents are as follows:

(1) Larry Shockey's handwritten interview notes.

Although, as mentioned above, it is not the practice of the OCC to maintain notes of taped interviews in the ordinary course of business, Larry Shockey kept his notes in this case. In addition to the Manuel Floyd notes (three pages) discussed above, the OCC files contain 44 pages of handwritten notes of other interviews. These are primarily notes made of Larry Shockey's taped interviews of police officers and other witnesses. (The tapes have already been turned over to the charged officers.)

The 44 pages also include Larry Shockey's notes made during or after listening to Police Department interview tapes made in connection with the homicide investigation. (The charged officers also have copies of these tapes.) There is also a page of notes of an untaped interview with a neighbor, Janice Fournier, and her son, Mark Fournier. These notes contain exculpatory matter which was included verbatim at page 19 of the OCC's report,

which the officers, of course, have received. In addition, there is one page containing a few notes of a conversation with Walter Aldridge, the prosecuting district attorney in the underlying case. These notes say virtually nothing. Finally, there is a page containing two sentences from an untaped interview with Esther Brown, a Smoot neighbor.

It is important to understand that although the charged officers' attorneys may argue to the contrary, it is our opinion that the charged officers have not yet requested copies of these interview notes or other unproduced documents. We have provided the following analysis to prepare you for any claim that such documents should have previously been produced.

The officers' only feasible argument that they have already requested these notes would lie in the first category enunciated in their January 25, 1989 letter, which is attached hereto as Exhibit A. That category requests: "All notes, minutes, tape recordings, or any memorandum made of any meetings or conferences held by OCC staff wherein any of the above named inspectors were discussed." We read that first category to seek notes and other material concerning OCC staff meetings or conferences, and have responded to the request based on that reading. This reading of the first category is reinforced by the nature of the other requests made in the January 25 letter. In addition, a request for OCC interview notes of working notes could easily have been made if that was what was intended. Although they have never formally expanded on their January 25 letter, which requested specified categories of documents, the charged officers apparently seek or may seek every document in the possession of the OCC.

(2) Ten disposition letters sent by the OCC to officers not named in the OCC complaint.

The OCC reviewed the conduct of officers other than McCoy, Dean, Casillas, and Kidd in connection with its investigation. The OCC determined that there was no evidence to indicate any improper actions on behalf of these officers. Disposition letters (identical to those sent to the four charged officers) were sent to these officers. I am informed by the OCC that the last page of OCC findings, which related only to these officers, was attached to the letters. (The file copies do not have any attachments.) The charged officers have already received a *complete* set of the OCC findings, including the last page.

(3) Two-page list of interviews conducted by Larry Shockey during his investigation, and a clean copy of the first page of that list.

(4) Two routing and transmittal slips.

(5) Memo from Frank McCoy to Lieutenant Crowley regarding scheduling of Inspector McCoy's OCC interviews.

(6) Front page of complaint card in case no. 0489-88.

The back side of this card was attached to the May 5, 1988 transmittal letter to Bill Paul, which has been produced to the charged officers.

(7) Note, written on telephone answering slip, regarding paramedics.

(8) Three Documents relating to Larry Shockey's request to the Police Department for enlargement of proofs.

(9) Computer printout, apparently made by Larry Shockey, from Police Department data base (four pages).

(10) Petition (16 pages) demanding immediate investigation of the Police Department's homicide investigation of George Smoot's death.

(11) Transmittal letter from KGO-TV to Michael Gash regarding KGO video tape.

(12) Numerous newspaper articles collected by the OCC.

(13) Computer printout apparently made by Larry Schockey [sic] from Police Department data base (one page).

(14) Article entitled "Houses Divided", by Greg Spalenka, from Image Magazine, San Francisco Sunday Examiner/Chronicle, dated February 21, 1988.

(15) Press release dated April 27 entitled "Gay and Lesbian leaders File a Police Misconduct Complaint on the Investigation of the Murder of George Smoot".

(16) Receipt signed by Michael Gash for 30 audio tapes received from Larry Shockey on August 17, 1988.

Again, it is our view that the charged officers do not have a due process right to any of the documents listed above. However, the OCC has indicated that it will not be harmed by the release of these documents. Therefore, we

advise the Commission to produce these documents, even absent a request from the charged officers, to forestall future piecemeal requests for documents and the delays, specious claims, and dilatory tactics attending such requests.

Finally, in an attempt to anticipate other arguments that the charged officers may make tonight or in the near future, we advise you that the charged officers do not need a continuance in order to review these documents because the next hearing in this matter is scheduled for July 5. Because these documents have not previously been requested and need not be produced under due process principles, previous failure to produce them would obviously not constitute grounds for dismissal of this disciplinary action. If you decide to turn over the documents and the charged officers or their attorneys have any questions about the documents, they should contact either me or Art Hartinger at the City Attorney's Office.

Very truly yours,

LOUISE H. RENNE
City Attorney

BURK E. DELVENTHAL
Deputy City Attorney
/s/ Mariam M. Morley
MARIAM M. MORLEY
Deputy City Attorney

MMM:wrc

cc: Commissioner Nelder
Commissioner Medina
Commissioner Lee

APPENDIX T

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FRANK McCOY,

Plaintiff,

vs.

THE CITY AND COUNTY OF SAN FRANCISCO, et al.,

Defendants.

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CERTIFIED COPY

No. C-91-2856-SC

Deposition of:
FRANK McCOY
October 12, 1994

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* * *

[p. 70] had said to them this was a political case?

A. Chief Jordan's behavior in this case indicates that it's a political case.

Q. And by his "behavior," what specifically do you mean?

A. In asking and disseminating the responses to the questions that he had, by dealing with me when everything showed in an exculpatory fashion that I wasn't involved, and he continued to charge me. And allowed me to defend myself for years through lengthy Police Commission hearings that were separated sometimes by months from meeting to meeting. This case was dragged out. It was very painful to go through.

These are just a few of the reasons that I feel the way I do and viewed it this way.

Q. Okay.

We may have covered this before indirectly, but do you – has anyone told you that Chief Jordan reviewed the typed answers, Exhibit 1 and the pages we don't have?

A. All I know is that they were forwarded or given to him by Deputy Chief Gurnett.

Q. Okay.

Now, you referred to the filing of McCoy II. And do I understand you to say that you [p. 71] viewed the filing of McCoy II, charges against you, as also being a part of a wrongful act on the part of Jordan?

A. Yes.

Q. And did I understand you to say that you viewed that as being in retaliation for having successfully defended yourself in McCoy I?

A. Yes.

Q. Okay.

And has anyone said to you that Chief Jordan was filing McCoy II in retaliation for what happened in McCoy I?

A. His behavior, his actions in how he dealt with this case, to me, says that.

Q. Okay.

And I understand that answer.

A. And also, on the night that the Police Commission acquitted the four of us, I and others went to a restaurant on Van Ness Avenue where I saw Commissioner Giraudo, a lady who was with them who was a business associate of his, and Chief Jordan.

As I was walking by them to a telephone, Commissioner Giraudo put his hand out and congratulated me and the other three for the acquittal on the case, at which time Chief Jordan [p. 72] said to me, "You're only halfway through this."

I said to him, "What do you mean?"

He says, "Well, you still have these other charges that you're going to have to face."

So that's why I feel the way I do.

Q. What else –

A. Along with the amount of time that had gone on when even persons in the O.C.C. recognized that McCoy I and II were one and the same and should have been tried together. I viewed McCoy II as sort of like the final Pedro

in his hand where if he didn't get me in McCoy I, he was going to take another shot in McCoy II. That's exactly what he did.

Q. This conversation with Commissioner Giraudo, that occurred at the House of Prime Rib Restaurant?

A. Yes, it did.

Q. And you identified, besides Giraudo, Chief Jordan and a woman who was a business associate of Giraudo?

A. Yes. I forget the lady's name. He and the Commissioner at that time, I believe, were partners in Boudin Bakery.

Q. And –

MR. LASSART: Sorry. Did you say "he" [p. 73] or "she"?

THE WITNESS: "He" being the Commissioner Giraudo, and "she" being his partner or associate in the bakery business.

MR. MAHONEY: Q. Do you remember anything else being said other than what you've described?

A. Yes. I said to Chief Jordan that, "You were wrong, as you know, in McCoy I, and you're wrong in McCoy II, also," is what I said to him.

Q. Anything else you remember being said by either party?

A. Yes. He said, "Well, you should have taken McCoy I," like I should have just stood there and allowed

him to do what he wanted to do. That was my impression of what he meant.

Q. Anything else?

A. Generally, that was it.

Q. Okay.

Was this – were voices raised?

A. No.

I'd say Chief Jordan's vocal demeanor was very pointed, very retaliatory. But the tone of voice was reasonable. It didn't attract any commotion.

Q. Was he sitting the whole time?